Central Law Journal.

ST. LOUIS, MO., MARCH 26, 1897.

The decision in the case of Curren v. Galen, by the New York Court of Appeals, is one of much importance and without doubt will attract attention far beyond the limits of the State in which it was rendered. Involved in the case was the question as to the right of freedom of labor. Of late years the determination of questions of this character by the courts have been rendered necessary by the action of labor organizations. In the case referred to, the New York court holds that if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom, and through contracts or arrangements with employers to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, their purpose is unlawful. It seems that plaintiff, who was an engineer by trade, brought suit against the defendants for having conspired to injure him by taking away his means of earning a livelihood and preventing him from obtaining employment. The defendants were members of an organization known as the Brewery Workingmen's Local Assembly of the Knights of Labor, which aimed to control the acts of its members in relation to the brewing trade. The plaintiff alleged that in 1890 two of the defendants threatened that unless he would join the organization referred to and subject himself to its rules and regulations, they would obtain his discharge from the employment in which he then was, and would make it impossible for him to obtain employment in the city of Rochester or elsewhere. Upon his refusal the defendants made complaint to his employers, forced them to discharge him, and otherwise endeavored to prevent him earning a livelihood in his trade.

In their answer the defendants admitted the fact of the existence of the organization and that it assumed to control the acts of its members, but set up the fact of the existence in the city of Rochester of a body known as the Ale Brewers' Association, and of an agreement between that association and the local assembly referred to, to the effect that all employees of the brewery companies belonging to the association should be members of the local assembly, and that no employee should work for a longer period than four weeks without becoming a member. They further alleged that the plaintiff had been retained in the employment of one of the brewing companies for more than four weeks after he had been notified of the provisions of the agreement requiring him to be a member of the local assembly; that they requested him to become a member, and that upon his refusal to comply they, acting as a committee appointed for the purpose, notified the officers of the brewing company of his refusal to become a member, and that they did this solely in pursuance of the agreement mentioned. The plaintiff demurred to this defense on the ground that it was insufficient in law. The court of appeals affirmed the decision of the court below, sustaining the demurrer.

The court said in its opinion that in the general consideration of the subject it must be presumed that the organization or the cooperation of working men is not against any public policy, but that the social principle which justifies such organizations is departed from when they are so extended in their operation as either to intend or to accomplish injury to others. The effectuation of such a purpose, the court said, would conflict with that principle of public policy which prohibits monopolies and exclusive privileges, for it would tend to deprive the public of the services of men in useful employments and capacities. Every citizen, the court continued, is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful vocation, under conditions equal as to all, and to enjoy the fruits of his labor without the imposition of any conditions not required for the general welfare of the community, and the sympathies or the fellow-feeling which as a social principle, underlies the association of workingmen for their common benefit are not consistent with a purpose to oppress the individual who prefers, by single effort, to gain his livelihood.

In conclusion, the court said that while it did not intend to intimate that the organiza-

tion of the local assembly in question by the workingmen in the Rochester breweries was not perfectly lawful in its general purposes and methods, yet, that so far as a purpose appeared from the defense set up to the complaint that no employee of a brewery company should be allowed to work for a longer period than four weeks without becoming a member of the Workingmen's Local Assembly, and that a contract between the local assembly and the Ale Brewers' Association should be availed of to compel the discharge of the independent employee, it was in effect a threat to keep persons from working at the particular trade, and to procure their dismissal from employment, and that while it might be true, as argued, that the contract was entered into on the part of the Ale Brewers' Association with the object of avoiding disputes and conflicts with the workingmen's organization, that feature and such an intention could not aid the defense, nor legalize a plan of compelling workingmen not in affiliation with the organization to join it, at the peril of being deprived of their employment and of the means of making a livelihood.

Upon this subject see the recent decision of Vegelahn v. Guntner, 44 N. E. Rep. 1077, 43 Cent. L. J. 457, 464, wherein the Supreme Judicial Court of Massachusetts holds that the maintenance of a patrol of two men in front of plaintiff's premises, in furtherance of a conspiracy to prevent, whether by threats and intimidations or by persuasion and social pressure, any workman from entering into, or continuing in his employment, would be enjoined.

NOTES OF RECENT DECISIONS.

CARRIERS OF LIVE STOCK — LIMITATION OF LIABILITY—REASONABLENESS.—The Supreme Court of Illinois, reversing the Appellate Court, holds, in Baxter v. Louisville, N. A. & C. Ry. Co., 45 N. E. Rep. 1003, that a provision, in a contract for the carriage of live stock, that the shipper, as a condition precedent to recovery of damages for injury to said stock, will give notice in writing of his claim to some officer of the carrier or its nearest station agent, before said stock is removed from the place of delivery, and before it is mingled with other stock, is void, for unreasonableness, where the contract limits the company's liability to damages sustained on its own line, and the destination of the stock was on another line, several hundred miles beyond the terminus of defendant's line, and defendant had no station agent or officer at or near the place of destination. The court cites with approval Smither v. Railroad Co. (Tenn.), 6 S. W. Rep. 209, and Cates v. Railroad Co., 41 Ill. App. 607. The case of Sprague v. Railroad Co., 34 Kan. 347, holding *contra*, is distinguished.

ASSIGNMENT—VERDICT FOR TORT.—It is decided by the Supreme Court of Minnesota, in Kent v. Chapel, 70 N. W. Rep. 2, that under Gen. St. 1894, § 5171, providing that after a verdict of a jury or report of a referee in any action for a wrong, such action shall not abate by the death of any party, a verdict in an action for a wrongful personal injury is assignable. The court says that "in Hunt v. Conrad, 47 Minn. 557, 50 N. W. Rep. 614, it was held that a right to recover damages for a personal tort was a mere personal right, and not assignable, even after verdict, and before judgment. This decision seems to have been based upon what was considered by the court principles of the common law, and its attention was evidently not called to Gen. St. 1878, ch. 66, § 41 (Gen. St. 1894, § 5171), which, in part, reads as follows: 'After a verdict of a jury, decision or finding of a court or report of a referee in any action for a wrong, such action shall not abate by the death of any party.' The legal effect of this statute is not discussed or adverted to in Hunt v. Conrad, and, even if sound in enunciating the common-law doctrine, it is inapplicable to the statute which we have quoted, and which is the same as Gen. St. 1894, § 5171. In the later case of Cooper v. Railway Co., 55 Minn. 134, 56 N. W. Rep. 588, it was held that, where the party dies after the rendition of a verdict in an action brought to recover for personal injuries sustained through the carelessness or negligence of the defendant, the action does not abate, but may be continued by or against the personal representatives of the deceased, under the provision of the statute which we have above quoted. The language used in our statute is substantially that in Wait, Code N. Y. § 121

and it was held under that Code that: 'A claim for damages for a purely personal wrong, while it remains unliquidated and unascertained by a verdict, dies with the person; but the intention of the section of the code above cited seems to be to prevent this result after the claim has been ascertained by a verdict. In that case the verdict becomes property, which passes to the representatives of the deceased, as a judgment would at common law. It then becomes the duty of the executor or the administrator to defend it for the benefit of the estate.' Wood v. Phillips, 11 Abb. Prac. (N. S.) 1. In the case at bar the claim for damages became liquidated and determined by the verdict. There was no further uncertainty about the claim, and the statute, by its terms, recognizes and preserves the right of entering judgment upon it. This right is a valuable one, and the verdict should be regarded as a property right—as much so as a verdict rendered for violation of a contract, or other causes of action not arising out of tort. The verdict was therefore assignable, by virtue of the terms of the statute."

WITNESS — EXAMINATION — SUSTAINING CREDIT OF IMPEACHED WITNESS.—In Tippett v. State, 39 S. W. Rep. (not yet reported), the Court of Criminal Appeals of Texas, per Judge Henderson, recently decided an interesting question. It held that, where the State, on cross-examination of a material witness for the defendant, elicits, for the purpose of impeachment, evidence that there are indictments or charges pending against him for theft of cattle, the defendant may on re-examination have such witness detail the circumstances under which he was so indicted, so that the explanation may be considered by the jury for the purpose of sustaining his credibility and for removing or attempting to remove the stain upon his character resulting from such impeachment. The court on this point says:

The question of the admissibility of the character of testimony offered by the State to impeach the witness, Ragland, has been heretofore discussed by this court. In some of our States it is held that testimony showing that a witness is under a charge of a criminal offense, is not admissible for the purpose of impeaching him on the ground that, until there is proof of conviction, the witness is protected by the legal presumption of innocence. In Carroll v. State, 32 Tex. Crim. Rep. 431, this character of evidence was held admissible in this State; and see the question also discussed in Brittain v. State, 32 St. Rep. 758. So we take it, that it is now well settled that the State can introduce this character of testimony for the purpose of impeaching a witness. But the question is now presented, we believe for the first time in this court, whether or not, after the State has in the first instance on cross-examination, adduced this impeaching testimony, it is permissible for the defendant on the re-examination of said witness, to show the groundlessness of the charge contained in the indictment. The reason of the ruling for authorizing this character of testimony to impeach a witness on behalf of the State is well expressed by Campbell, J., in Wilbur v. Flood, 16 Mich. 43, 8 Crim. Law Mag. & Rep. p. 86. He says: "It has always been found necessary to allow witnesses to be cross-examined, not only upon the facts involved in the issue, but also upon such collateral matters as may enable the jury to appreciate their fairness and reliability. To this end a large latitude has been given, where circumstances seem to justify it, in allowing a full inquiry into the history of witnesses, and in many other things tending to illustrate their character. This may be useful in enabling the court or jury to comprehend just what sort of person they are called upon to believe, and such knowledge is often very desirable. It may be quite as necessary, especially where strange or suspicious witnesses are brought forward, to enable counsel to extract the whole truth from them on the merits. It has always been held a witness may, on cross-examination, within reasonable limits be very thoroughly sifted upon his character and antecedents. The court has a discretion as to how far propriety will allow this to be done in a given case, and will or should prevent any needless or wanton abuse of this power. But within this discretion, we think a witness may be asked concerning all antecedents which are really significant, and which will explain his credibility and it is certain that proof of punishment in a State prison may be an important fact for that purpose. And it is not very easy to conceive why this knowledge may not be as properly derived from the witness as from any other sources. He must be better acquainted than others with his own history, and is under no tempation to make his own case worse than the truth will warrant. There can be with him no mistake of identity. If there are any extenuating circumstances, no one else can so readily recall them. We think the case comes within the well established rule of cross-examination, and that the few authorities which seem to doubt it have been misunderstood, or else have been based upon a fallacious course of reasoning, which would, in nine cases out of ten, prevent an honest witness from obtaining better credit than an abandoned ruffian." Upon the point now before us we call attention to the expressions used in the latter part of the above quotation, to-wit: "He must be better acquainted than others with his own history; and is under no temptation to make his own case worse than the truth will warrant. If there are any extenuating circumstances no one else can so readily recall them."

Rice on Evidence, Sec. 372, has the following: "Among the stereotyped questions prepounded to a witness, with the view of impairing his credit, is this, 'were you ever arrested and convicted of such a crime?' (naming the crime). In the vast majority of instances the interlocutor has previous knowledge of the facts, and the reply elicited is almost invariably in the affirmative. This naturally creates unfavorable presumptions. This is a matter of no small impor

tance to the criminal bar of this country, to know that relief may be afforded in part at least, from these unfavorable impressions, by eliciting, upon the re-direct examination, testimony from the witness declaratory of his innocence of the crime charged; and this, too, although the record of his conviction be produced." Citing Sims v. Sims, 75 N. Y. 467; and Walcott v. Tifft, 35 N. S. L. R. 93. In our opinion, it would be exceedingly unfair to authorize the State by this method of cross-examination, to impeach a witness by showing that he was then under a criminal charge or accusation, and not permit the defendant, in order to bolster his witness against such an assault to show by such witness any circumstance or explanation that would go to relieve the witness of the imputation of untruthfulness or want of credit thus cast upon him by the State. We would not be understood as holding that the court would be authorized to enter into an investigation of the merits of this collateral issue; but we do hold, where this method of impeachment of a witness is resorted to on cross-examination, that on the re-examination of the same witness, defendant should be permitted to show such explanatory circumstances, in connection with matter inquired about, as would go to remove the implication of untruthfulness and serve to reinstate the witness. This case is an apt illustration of the fairness of the rule. Here, in order to discredit the witness, the State was permitted to show that he was under indictment for the theft of three head of cattle. This left the witness under a cloud. He should have been permitted to state on his re-examination, that he was a *bona fide* purchaser of said cattle and had not stolen them. The accusation, with the explanation made by the witness, would then all be before the jury, who, in passing upon his credit, would take all the facts into consideration. If the testimony of the witness was of an unimportant or immaterial character, the refusal of the court to permit this testimony, might not afford a ground for a reversal of the case; but it occurs to us that the testimony of said witness was of a material character. (Court discusses the materiality of witness' testimony and concludes): It strongly tended to corroborate the defendant's witnesses as to the fact that deceased was armed with a pistol at the time of the homicide, and that the defendant knew or believed that he was so armed; and in our opinion, after the testimony of this witness was impeached by the State, the court committed a material error in not allowing the testimony on his re-examination, which would tend to explain this impeaching testimony, and to reinstate his credit with the jury.

MONOPOLIES—COMBINATION IN RESTRAINT OF BUSINESS — PROMISSORY NOTE. — The case of Milwaukee Masons & Builders Assn. v. Niezerowski, 70 N. W. Rep. 166, involves an interesting question of monopolies and combinations contrary to public policy. It is held that private by-laws of a masons' and builders' association, the membership in which includes 60 out of 70 or 75 mason contractors in a city, which require the members to pay to the association 6 per cent. on all contracts taken by them, and to submit all bids for work first to the association, and provide that the lowest bidder shall add 6 per cent. to his bid before it is submitted to the owner or his architect, are contrary to public policy, and void; and that a note given by a building contractor to an association of such contractors, of which he was a member, for a percentage on a contract for building, required to be paid to the association by a private by-law which was contrary to public policy, and void, will not be enforced. The court says on this point:

The question to be determined is whether the benefits and advantages which the defendant was entitled to receive, as a member of the association, in consequence of conducting its business under and in pursuance of the by-laws already noticed, constitute a lawful consideration for the note. The manifest purpose of the private by-laws was, by means of the combination thus effected, to suppress fair and free competition in bidding for building contracts in Milwaukee, and by such combination and method of bidding, upon its face apparently fair and free from objection, but in fact unfair and delusive, to compel owners to pay for the erection of buildings the sum of 6 per cent. in excess of what they would be otherwise obliged to pay for them if fairly let to the lowest bidder, uninfluenced by such combination. It seems to us that the restraint put upon the rights of proprietors by the provisions of these by-laws or rules, as well as the entire scheme thus disclosed, is contrary to public policy, and therefore void. Agreements in restraint of trade are against public policy and void, unless founded upon a valuable consideration, and limited as regards time, space, and the extent of the trade, to what is reasonable under the circumstances of the case. All such arrangements tend to deprive the public of the services of parties in the employments and capacities in which they are most useful, and they tend to expose the public to the evils of monopoly. Richards v. Seating Co., 87 Wis. 512, 58 N. W. Rep. 787, and cases cited. In Cloth Co. v. Lorsont, L. R. 9 Eq. 345, it was said: "All restraints upon trade are bad, as being in violation of public policy, unless they are actually, and not unreasonably, for the protection of parties dealing legally with some subject-matter of contract." The test whether the restraint is reasonable is laid down in Horner v. Graves, 7 Bing. 735, 743, where is is said: "The question is whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable." The combination in question is contrary to public policy, and strikes at the interests of those of the public desiring to build, and between whom and the association, or the members thereof, there exist no contract relations; and it is not distinguishable in principle from the case of Hilton v. Eckersley, 6 El. & Bl. 47, 64, 65. While all reasonable stipulations and means to protect labor or trade are laudable, we must hold that the means here sought to be employed are such as the law will not sanction. We must consider what may be done under such an agreement, and the result which it will necessarily produce. As already pointed out, the operation of this combination, under its private by-laws, is to suppress free and

fair competition in bidding for contracts, and by delusive and deceptive means members of the association are enabled to exact from owners a higher price for buildings than they would otherwise have to pay. In the matter of changes or additional work, all competition by other members of the association is prohibited, unless the amount exceeds the original contract price. And as the membership of the association embraces nearly six-sevenths of the mason builders in Milwaukee, the combination not only tends to suppress competition, but operates most unjustly towards builders not members of the association. The restraint thus imposed on the trade is neither fair nor reasonable. In People v. North River Sugar Refining Co. (Cir. Ct.), 2 Lawy. Rep. Ann. 33, 40 (3 N. Y. Supp. 401, 409), it was said that "all the cases, ancient and modern, agree that a combination, the tendency of which is to prevent general competition, and to control prices, is detrimental to the public, and consequently unlawful;" and many cases are there cited, and in the note, to the same effect. In Hooker v. Vandewater, 4 Denio, 349, it was held that an agreement between the proprietors of five lines of boats, engaged in the business of forwarders on the Erie and Oswego canals, to run for the remainder of the season at certain rates for freight and passage then agreed on, and to divide the net earnings among themselves in certain proportions, was a conspiracy to commit an act injurious to trade, and consequently void. The object expressed in the agreement was the "establishing and maintaining fair and uniform rates of freight, and equalizing the business among themselves, and to avoid all unnecessary expense in doing the same." Of this Jewett, J., observed: "The object of the agreement, as expressed in the written contract, was plausible enough, but it was impossible to conceal the real intention." He added that "the great, if not the sole, object of the agreement, was to destroy rivalry, and keep up the prices to certain rates fixed by themselves." Stanton v. Allen, 5 Denio, 434, was a very similar case, where it was held the agreement was void at common law, as contravening public policy, and injurious to the interest of the State. Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 186; Salt Co. v. Guthrie, 35 Ohio St. 672; Craft v. McConoughy, 79 Ill. 346; More v. Bennett (Ill. Sup.), 29 N. E. Rep. 888; Oil Co. v. Adoue (Tex. Sup.), 19 S. W. Rep. 274, 278, 279; Anderson v. Jett (Ky.), 12 S. W. Rep. 670. These are all cases quite in point, and show that the restraint on trade produced by this combination is unreasonable, and without legal sanction. The true test of the illegality of a combination to restrain business or trade is its effect upon the public interests; that is to say, of those outside of the combination. Nester v. Brewing Co., 161 Pa. St. 473, 29 Atl. Rep. 102. In Atcheson v. Mallon, 43 N. Y. 147, 149, it was said that: "The true inquiry, is, is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is that agreements which, in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound public policy, and are void." If, from the plaintiff's own showing or otherwise, a cause of action appears to arise *ex turpi causa*, the court will not allow a recovery. The maxim is "*Ex dolo malo actio non oritur.*" The defendant may properly invoke the maxim that in such cases "*potior est conditio defendentis.*" The court refused to interfere in such cases, not on account of the defendant, but in the larger interests of the public. Nestor v. Brewing Co., *supra*; Hooker v. Vandewater, 4 Denio, 352. In Wight v. Rindskopf, 43 Wis. 348, it was said by Ryan, C. J., that: "Courts owe it to public justice, and to their own integrity, to refuse to become parties to contracts essentially violating morality or public policy, by entertaining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court, whenever and however the contract is made to appear." No court will enforce such an agreement as the one before us, or compel the defendant to go any further in performing on his part by enforcing payment of the note. The verdict for the defendant was rightly directed.

SETTING ASIDE CONVEYANCES OF REAL ESTATE ON ACCOUNT OF FALSE AND FRAUDULENT REPRESENTATIONS BY THE VENDEE OR HIS AGENT.

Fraud Vitiates Deeds.—When a party has been induced by fraud to convey away his land, such deed may be set aside.[1] When statements designedly false have been made by one party to a contract to the other, who has accepted them and acted upon them as true, to his injury, relief will be afforded in a court of equity against its enforcement upon the ground of fraud, and a rescission will be decreed.[2] The same consequences follow when the party makes such false statements in ignorance as to their truth or falsity, since the other party has been injured thereby.[3] Such representations must be material and must have been acted upon by the other party to his injury.[4] A party was induced to sell some land by false representations that a foundry and machine shop would be immediately erected on the land conveyed, which would enhance the remaining property of the vendor. The obtaining thereby of property, which would not otherwise have been parted with, was considered a sufficient injury to justify the court in setting aside the deed, although the full value of the land was tendered.[5]

[1] Dean v. Brooks, 88 Wis. 667.

[2] Battelle v. Cushing, 21 D. C. 59; Wilson v. Carpenter, 91 Va. 183; Ashley v. Schmalinski, 46 La. Ann. 499.

[3] Battelle v. Cushing, *supra*; Parsons v. McKinley, 56 Minn. 464; Borders v. Kattleman, 142 Ill. 96.

[4] Battelle v. Cushing, *supra*; Lewis v. Brookdale L. Co., 124 Mo. 672; Hewlett v. Saratoga, etc. Co., 84 Hun, 248; De Frees v. Carr, 8 Utah, 488; Schubart v. Chicago, etc. Co., 41 Ill. App. 181; Smith v. Richards, 13 Pet. 26; Slaughter v. Gerson, 13 Wall. 379.

[5] Williams v. Kerr, 152 Pa. St. 560.

When Misrepresentations Impair Contracts.—Contracts have often been set aside, because one party has concealed from the other certain facts, which would probably have prevented its consummation.[6] Where a party obtained a conveyance of land for a stock of goods which he owned in another State, but failed to state that he had not paid for them and by contract could not move them until such payment was made, the deed was set aside.[7] But it is only when the party is in good faith bound to make the disclosure, that concealment becomes equivalent to a false representation.[8] A party in possession of seventy-two acres of public land offered to buy seventy-two acres of such land at the price fixed per acre by the board in charge of such land, giving in his written proposition the courses, distances, and monuments, describing the tract, but in reality 152 acres of land were included in those boundaries. The deed was made, and relief therefrom was refused, because the board had complete maps of the land and should have informed itself as to the amount of land included in those boundaries.[9] There is no obligation on the intending purchaser to inform the owner of the land of the proposed construction of a railroad near the land nor of his efforts to induce its building.[10] A party about to purchase an oil-lease is not bound to disclose facts as to the production of oil on a neighboring leasehold, which he holds. Unless exceptional circumstances create a duty to speak, it is the right of every one to keep his business to himself.[11] When the contract has been induced on the faith of representations, any one of which is false, the whole contract is to be considered as having been obtained fraudulently, for who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed.[12] If such representation might have induced the making of the contract, it will be inferred that it did so.[13] Fraud, however, cannot be predicated upon representations unless they refer to existing facts; it cannot arise from promises to do something in the future.[14] Mere expressions of opinion are immaterial.[15] Where the party does not rely on the representations, but on his own judgment and information, he is not entitled to any relief.[16] Ordinarily, where the means of knowledge are at hand and equally available to both parties to a contract, the courts will not assist that party, who fails to use such means and trusts the representations of one interested in misleading him.[17] In the absence of any misleading word or act by the opposite party, it is the duty of each party to satisfy himself as to the matters involved before the contract is made.[18] The law only requires a party to act with prudence, and he may rely on positive representations of fact made by the other party to the contract, even though he possesses means of discovering their falsity.[19] The rule of *caveat emptor* in private sales applies only in the absence of fraud.[20] When false representations have been made, it does not lie in the mouth of the defendant to say that plaintiff was negligent in relying on them, or was advised to consult counsel, or had facts brought to his knowledge which ought to have put a reasonably prudent man on inquiry: he must stand or fall on the truth and good faith of the representations that led to the contract.[21] A party was induced to convey his lands for other land on the false representations of the vendor's agents, that there was a large demand for buildings on the ground he was buying, that a railroad was about to move its shops to the vicinity, and that a syndicate had been formed to buy this land and a certain large sum had been offered for it.

[6] Smith v. Richards, 13 Pet. 26.
[7] Nairn v. Ewalt, 51 Kan. 355.
[8] Stewart v. Wyoming, etc. Co., 128 U. S. 383; Rison v. Newberry, 90 Va. 513.
[9] Board of Comrs. v. Younger, 29 Cal. 172.
[10] Burt v. Mason, 97 Mich. 127.
[11] Neill v. Shamburg, 158 Pa. St. 263.
[12] Reynell v. Sprye, 1 De G. M. & G. 660.
[13] Wilson v. Carpenter, 91 Va. 183.
[14] Balue v. Taylor, 136 Ind. 368; Day v. Fort Scott, etc. Co., 153 Ill. 293.
[15] Johanson v. Stephanson, 154 U. S. 625; Day v. Fort Scott, etc. Co., 53 Ill. App. 165; Bradfield v. Elyton L. Co., 93 Ala. 527; Smith v. Richards, 13 Pet. 26.
[16] Calhoun v. Quinn (Tex. Civ. App. Dec. 1892), 21 S. W. Rep. 705.
[17] Short v. Pierce (Utah, Feb. 1895), 39 Pac. Rep. 474; Lake v. Tyree, 90 Va. 719; Board of Comrs. v. Younger, 29 Cal. 172; Slaughter v. Gerson, 13 Wall. 379; Lewis v. Brookdale L. Co., 124 Mo. 672.
[18] Battelle v. Cushing, 21 D. C. 59.
[19] Battelle v. Cushing, *supra*; Wilson v. Carpenter, 91 Va. 183.
[20] Battelle v. Cushing, *supra*.
[21] Nelson v. Carlson, 54 Minn. 90; Reynell v. Sprye, 1 De G. M. & G. 660; Sutton v. Morgan, 158 Pa. St. 204.

Though the court set aside the transfer for fraud, yet it would not allow him his costs on account of his gross carelessness in not inquiring as to the truth of the representations made.[22]

Representations as to Distant Property.—When the property lies in a distant State, and the plaintiff is induced by false representations concerning the title, nature, etc., of the land to buy the same and convey his own land, he may have his deed canceled for fraud.[23] When a party is induced to part with his own land, which is in a distant State and with which he is not familiar, by false representations of the vendee as to his title or the nature or value of the land, he may have his deed rescinded.[24] Where the owner of land in a distant State was induced to sell it for a small sum on the false representation that the proposed purchaser held a tax title on it, which was so old that all defects therein were cured, his deed was set aside.[25] A deed by persons living in a distant country conveying an interest in a mine, concerning which they have no independent means of knowledge, induced by the false representations of the vendee, that they had no real interest therein, and that he desired the conveyance merely to fortify his own title in pending litigation, was set aside.[26] An attorney obtained a deed to land worth $4,000 for $100 on false statements to the owner, who lived 1,000 miles away, that the deed to his grantor was forged, that his title was worthless and the land was of little value. The deed was set aside.[27] An exchange of land for land in another State, which was practically worthless, on representations that it was good farming land and worth $10 an acre, was set aside, though the defendant was not aware of the falsity of his representations.[28]

Abuse of Confidential Relations.—When a fraud is perpetrated by abuse of confidential relations, equity will give redress; and while in many cases it will intervene and set aside the transaction, though no damage is shown, in all cases the burden is on the party deriving an advantage therefrom to show that the transaction was free, deliberate and voluntary, with full knowledge of its effect and operation.[29] It is said that courts have never fettered the operation of this principle by undertaking to define confidential relations. It is declared to extend to all cases, where confidence is reposed and in which dominion and influence, resulting from such confidence, may be exercised.[30] When a purchaser has full knowledge of the situation and value of land, and the owner resides at a great distance therefrom and has no adequate knowledge or means of knowledge on the subject, and the purchaser, without fully disclosing the material facts respecting such value, having or securing the confidence of the owner, thereby induces him to sell for much less than the real value, upon information given him by the former, which information is partial, misleading and false as to such true value or any of such material facts, and the case is not barred by laches, the sale will be set aside at the option of the vendor.[31] A married man, with a wife and small child, who was in straightened circumstances and so sick that he required attention day and night from his wife, gave a mortgage to his friend, in whom he had implicit confidence, and who was also county treasurer, in order to take up another mortgage on his land. The friend, as part consideration for the mortgage conveyed some lots, which he insisted should be taken and on which he only held tax titles, and whereof he said his title was perfect. These titles had been declared invalid by the supreme court five years before this, of which fact he must have been aware. The mortgage was declared invalid.[32] Where one standing in a fiduciary relation obtained an absolute deed to real estate by means of a promise to reconvey, the violation of such promise was considered to be a constructive fraud, and the deed was canceled.[33] An attorney for a deceased party

[22] Sutton v. Morgan, *supra*.
[23] Florida v. Morrison, 44 Mo. App. 529; Borders v. Kattleman, 142 Ill. 96; Smith v. Richards, 13 Pet. 26; White v. Louden, 28 N. Y. Sup. 619; Armstrong v. Helfrich, 34 Neb. 358.
[24] Parry v. Parry, 80 Wis. 123; White v. Louden, 28 N. Y. Sup. 619.
[25] Matlack v. Shaffer, 51 Kan. 208.
[26] Billings v. Aspen, etc. Co., 51 Fed. Rep. 338.
[27] Robinson v. Reinhart, 137 Ind. 674.
[28] Smith v. Bricker, 86 Iowa, 285.
[29] Zimmerman v. Bitner, 79 Md. 115; Saunders v. Richard, 35 Fla. 28; Kaut v. Gerdemann, 109 Mo. 552; Henninger v. Heald, 52 N. J. Eq. 431; Barnard v. Gantz, 140 N. Y. 249.
[30] Zimmerman v. Bitner, *supra*.
[31] Parry v. Parry, 80 Wis. 123.
[32] Carlton v. Hulett, 49 Minn. 308.
[33] Alaniz v. Casenave, 91 Cal. 41.

continues as such relative to the heirs, till he has fully imparted to them all information he has obtained as such attorney as to the condition of such estate, and a deed from an heir to him of part of his interest in the estate, obtained at a reduced rate because of such information withheld, may be set aside.[34] Where an illiterate man was induced to exchange real estate, being shown a long and complicated abstract of title of the property received, evidently relying on the statements of the other party, who was shrewd, artful and of dubious reputation, his deed was canceled.[35] Whether a party can be relieved from a deed, which is misrepresented to him, but which he signs relying upon the statements of others without reading it or asking to have it read, is a proposition on which courts differ.[36]

Undue Influence.—Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party, which controls the free action of his will and prevents voluntary action in making a contract or in executing a deed for real estate, equity may relieve on the ground of undue influence.[37] Circumstances of extreme necessity and distress have so overcome a party's free agency, that courts have felt justified in setting aside his contract on account of some oppression, fraudulent advantage or persecution attending it.[38] Such cases have occurred relative to persons of feeble health, especially where there were confidential relations between the parties.[39] Weakness of mind is an important element for the consideration of the court in such cases, but is not alone sufficient,[40] unless the party is *non compos.*[41]

Acts of Agents.—Where a principal obtains any advantage by the fraud of his agent, if he retains such advantage he cannot assert the fraud was unauthorized by him.[42] The same rule is enforced, when any one, save an innocent purchaser for value, enjoys the results of the fraud of another. Where wives have mortgaged their property to creditors on false statements of their husbands, that by such action they would relieve the husbands from ruin and enable them to continue their business, such deeds have been set aside, though the creditors were entirely ignorant of the representations.[43] Where A by his acts and conduct furnishes the motives for the agent of B not to give B information, which the agent actually withholds, and which if given would have prevented the execution of the contract between A and B, A is guilty of such fraudulent conduct that B may have the contract conceled.[44] So, if the agent of the vendor colludes with the vendee to sell the land at a grossly inadequate price, the vendor, who relied on his agent, may have the sale set aside.[45] Where however A has been induced to convey land to B on false representations by his own agent as to B's intentions in accepting the conveyance, A cannot have his deed annulled, if B fails to carry out such intentions, when he had made no statement of any intention, though the said agent was to a limited extent his agent but had no authority to make such statements.[46]

Rescission of Fraudulent Contract.—When a party discovers that a fraud has been perpetrated upon him in the making of a contract, if he wishes to rescind it he should take prompt measures to do so.[47] He is allowed a reasonable time within which to do so.[48] If however after such discovery he continues to treat the contract as still in force, he ratifies it,[49] but such acts must be unequivocal in order to defeat the right of rescission.[50] In case of such ratification, he cannot claim a subsequent right to rescind by reason of a subsequent discovery of some incident of the fraud.[51] The right of rescission may be

[34] Beedle v. Crane, 91 Mich. 429.
[35] Goodrich v. Smith, 87 Mich. 1.
[36] *Pro:* Smith v. Smith, 134 N. Y. 62; *Contra:* Hawkins v. Hawkins, 50 Cal. 558.
[37] Hartnett v. Hartnett, 42 Neb. 23.
[38] Bell v. Campbell, 123 Mo. 1; 1 Story's Eq. (3d Ed.) 250, § 239.
[39] Chase v. Hubbard, 153 Mass. 91; Hartnett v. Hartnett, *supra;* Chambers v. Chambers, 139 Ind. 111.
[40] Davis v. Phillips, 85 Mich. 198.
[41] Henrize v. Kehr, 90 Wis. 344; Pike v. Pike, 104 Ala. 642.
[42] Sistare v. Heckscher, 15 N. Y. Sup. 737; Billings v. Aspen, etc. Co., 51 Fed. Rep. 338.
[43] Sistare v. Heckscher, *supra*; Fleming v. Ogden, 152 Pa. St. 419.
[44] Ashley v. Schmalinski, 46 La. Ann. 499.
[45] Slator v. Trostel (Tex. Civ. App. Oct. 92.), 21 S. W. Rep. 285.
[46] Schultz v. McLean, 93 Cal. 329.
[47] Taylor v. Short, 107 Mo. 384; Saunders v. Richard, 35 Fla. 28.
[48] Parsons v. McKinley, 56 Minn. 464.
[49] Bement v. La Dow, 66 Fed. Rep. 185; Taylor v. Short, 107 Mo. 384; Bedier v. Reaume, 95 Mich. 518.
[50] Tarkington v. Purvis, 128 Ind. 182.
[51] Taylor v. Short, 107 Mo. 384.

waived by failure to take action,[52] depending very much on the circumstances of each case.[53] In order to rescind such contract, it is generally said, that the party must tender, or offer to return, the property received under it.[54] Some courts require such tender to be made before suit is brought,[55] others are satisfied with a tender in the pleadings,[56] while in one court it is sufficient under the code to set out the facts, and the court will make the necessary orders.[57] This rule is sometimes departed from owing to the necessities of the case. A tender is dispensed with, where the party has not control of the property,[58] where he has disposed of it,[59] and when he did not himself receive it nor has control of it by virtue of the contract.[60] When he cannot put the party *in statu quo*, as where property, conveyed to him subject to a deed of trust, is about to be sold under the deed, it suffices for him to notify the other party of the condition of affairs.[61] So if he has sold part of the property, he can offer to return what he retains, and to pay full compensation for the balance.[62] When the defendant has put it out of his power to make restitution, payment of compensatory damages should be decreed.[63] The pleadings must set out the particulars of the fraud—an allegation of fraud is a conclusion of law,[64]—which must be clearly and convincingly proved, if the contract is intelligently made and no fiduciary relations exist.[65] Where several have acted together in procuring the fraudulent contract, it is proper to enter a decree against all for the money received thereby.[66]

S. S. MERRILL.

[52] Rugan v. Sabin, 53 Fed. Rep. 415.
[53] Robinson v. Reinhart, 137 Ind. 674.
[54] Day v. Fort Scott, etc., Co., 153 Ill. 293; Bowden v. Achor, 95 Ga. 243; Balue v. Taylor, 136 Ind. 368.
[55] Pidcock v. Swift, 51 N. J. Eq. 405.
[56] Thompson v. Cohen, 127 Mo. 215; Henninger v. Heald, 52 N. J. Eq. 431; Gross v. Scott & Co., 48 Fed. Rep. 35; Garza v. Scott, 5 Tex. Civ. App. 289.
[57] Knappen v. Freeman, 47 Minn. 491; Nelson v. Carlson, 54 Minn. 90; Carlton v. Hulett, 49 Minn. 308.
[58] Pidcock v. Swift, 51 N. J. Eq. 405.
[59] Henninger v. Heald, 52 N. J. Eq. 431.
[60] Guild v. Parker, 14 Vroom. 430.
[61] Henninger v. Heald, *supra*.
[62] Henninger v. Heald, *supra*.
[63] Erickson v. Fisher, 51 Minn. 300.
[64] Reynolds v. Excelsior C. Co., 100 Ala. 296.
[65] Breemersh v. Linn, 101 Mich. 64.
[66] Watts v. British, etc., Co., 60 Fed. Rep. 483.

OFFICE AND OFFICERS — ELIGIBILITY OF WOMEN—CLERK OF COURT—ELECTIONS.

STATE v. HOSTETTER.

Supreme Court of Missouri, February 20, 1897.

1. A woman is not disqualified because of sex from taking the office of county clerk in Missouri. Women have been recognized in various ways as eligible to certain offices in this State. A woman may be a citizen of the State and of the United States.

2. A woman is not eligible as school director because the law requires of such an officer the qualifications of a voter, and under the constitution of Missouri only males may be voters.

3. The office of clerk of a court is ministerial, and its duties may be performed by a woman.

4. The word "his," as used in the organic and statutory law, applies to females as well as males, by virtue of section 6568 (Rev. St. 1889), unless a different intent is exhibited by the context.

5. In determining the meaning of an existing statute, it is proper to consider the prior law and al changes therein.

6. When a vacancy (required by law to be filled a t the next general election) occurs in an office, after the ordinary time for filing nominations has passed, the proper party authority may make a nomination thereto in the mode pointed out by section 4766 (Laws 1893, p. 155). Such a condition of affairs creates a "vacancy" in the nominations, within the meaning of the aforesaid section of the ballot law.

7. The Australian ballot act does not deprive electors of the right to put on the ballot names and offices entitled to be placed thereon, even though not printed there officially.

8. A special provision of law for filling a vacancy in a particular office should be followed even as against the terms of a later law in regard to elections generally, unless the court finds the latter intended to repeal the former.

9. The intent of the legislature as gleaned from the terms of a statute is the spirit of the law which the courts should enforce.

BARCLAY, C. J.: This is an action original in this court to ascertain by what warrant defendant holds the office of clerk of the county court of St. Clair county. The proceeding was instituted by an information of the attorney general in his official capacity. The information contains a full recital of the facts. They have been admitted by the demurrer which defendant has filed. Counsel in this court, with commendable fairness, have waived formalities that might have caused delay, and have submitted the cause for prompt decision upon briefs that have been of great help toward the speedy determination of the controversy.

In the view taken by this division of court, the following are the decisive facts: Mr. Wheeler was elected clerk of the county court at the general election of 1894 for a term ending in January, 1899. He died, October 24, 1896. Two days later the defendant, Mr. Hostetter, was commissioned by the governor to fill the vacancy. He qualified and entered on the duties of the office, before the general election of November 3, 1896.

He now holds the office by virtue of that appointment. At the general election mentioned, Mrs. Maggie B. Wheeler and Mr. Hostetter, received votes in St. Clair county for the office in question. On the 26th day of October, 1896, Mrs. Wheeler had been declared nominated for said office by the Republican party in said county. Her said nomination had been certified and acknowledged, and the certificate had been duly filed in the office of the clerk of the county court. Her name accordingly appeared (in advance of the election) upon the printed official ballot, as prepared for use at the election. The official ballot contained no other printed name as nominee for said office. The county tickets of the other political parties all showed blanks under the name of the office of clerk of the county court. At the close of the election, it was found that Mrs. Wheeler had 1,938 votes for the office, while Mr. Hostetter had received 92. He so certified as county clerk. In due time Mrs. Wheeler received her commission from the governor, and thereupon duly qualified, having complied with all the required forms of law, notwithstanding which, the defendant still holds possession of the office. The object of this proceeding is to test his right to do so, from and after January 4th, 1897, the date on which Mrs. Wheeler took the last formal step toward qualifying to enter upon the duties of the office. There are two general grounds on which defendant seeks to justify the position he has assumed.

1. Defendant first contends that there was, in legal effect, no vacancy to be filled at the election of 1896. The substance of the argument on that point is that the existing ballot law makes no provision for a nomination to fill such a vacancy, occurring within 15 days of the general election; and hence that no election to fill the vacancy could properly be held in the circumstances of this case. But we consider section 1964 a complete answer to that contention, when read in connection with section 4766 as amended in 1893 (Laws, 1893, p. 155):—"Sec. 1964. Vacancy, how filled.—When any vacancy shall occur in the office of any clerk of a court of record by death, resignation, removal, refusal to act or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

A special provision governing the filling of a vacancy in a particular office should be obeyed, even as against a later law on the same general topic, unless the court finds ground to conclude that the later general law was intended to repeal or limit the more particular provision of the prior law. But the terms of section 4766, as amended in 1893, show no intent to repeal any part of section 1964, touching the conduct of an election to fill such a vacancy. The word "vacancy" as it is found in the last proviso of section 4766, no doubt means, as the learned counsel for defendant contend, a vacancy in some nomination. But where, by reason of death, as in this case, a vacancy in an office occurs shortly before a general election at which some one to fill the office for the unexpired term should be chosen, and no one has been nominated to said office, there is a vacancy in the nominations within the meaning of the election law. The omission to make a nomination for an office to be filled at the ensuing election constitutes a vacancy on the ticket, and it is the plain duty of the officers who prepare the official ballots to cause the name of any such office to be printed on the ballot whether any nomination thereto has or has not been formally certified. Under section 4766 of the election law, such a "vacancy" certainly may be supplied at any time prior to the election, by a nomination authenticated in the mode pointed out by the ballot law. But even if we should concede that the vacancy caused by the death of Mr. Wheeler happened too late to permit of placing a formal printed nomination on the ballot, under the present ballot law, the people would nevertheless have the right to express their choice by writing on the ballot the name of any qualified person whom they desired to designate for any office which the law (section 1964) permitted to be then filled by election. The electors are not restricted to the names or offices printed on the official ballot. People v. Shaw (1892), 133 N. Y. 493, 31 N. E. Rep. 512; People v. President (1895), 144 N. Y. 617, 39 N. E. Rep. 641; Sunner v. Patton (1895), 155 Ill. 553, 40 N. E. Rep. 290; Cole v. Tucker (1895), 164 Mass. 486, 41 N. E. Rep. 681. We hence conclude that the election of a county clerk was properly held at the general election in St. Clair county in November last.

2. The question then remains whether the fact that Mrs. Wheeler is a woman renders her ineligible. Some objections of a technical nature are raised by the plaintiff against any consideration of that question on this occasion. But we pass them by, because we find it unnecessary to decide them, since we have reached the conclusion that Mrs. Wheeler is eligible. The qualifications required of incumbents of certain offices in Missouri are prescribed by the constitution. For instance, the governor, lieutenant governor, secretary of State, auditor, treasurer, attorney general and superintendent of public schools must be "male" citizens, as must also be the members of the general assembly. Const. 1875, art. 4, secs. 4 and 6; art. 5, secs. 5, 15 and 19. Every circuit judge must be a "qualified voter," which requirement is in effect the same as the word "male" imposes (as used in reference to the State officers above named). Const. art. 6, sec. 26; art. 8, sec. 2.

The following general command of the organic law applies to all offices, (including, of course,

that in view in this case): "No person shall be elected or appointed to any office in this State, civil or military, who is not a citizen of the United States, and who shall not have resided in this State one year next preceding his election or appointment." (Art. 8, sec. 12). There is no provision of the constitution, or of the statute law of Missouri, expressly requiring the clerk of the county court to be a male. But it is argued that the intent to so declare appears from the use of the word "his" in the section of the constitution, just quoted, referring to all offices. If this view is sound, then the special caution observed in the constitution by the sections requiring the State officers above mentioned to be males was wholly useless, as the general section last cited would imply that requirement. It was part of the general law of the State, long before the present constitution was adopted, that where persons are referred to by words importing the masculine gender, females as well as males should be deemed included thereby, unless a contrary intent appears by the context or otherwise. Rev. St. 1855, p. 1024, sec. 10; Rev. St. 1889, sec. 6568-9. The mere use of the word "his" in the constitution, in referring to the qualifications of officers, we do not regard as evidencing a purpose to limit all office-holding to the male sex, or as depriving the people of St. Clair county of the right to select a woman as clerk of their county court. The section of the constitution last above quoted was a new enactment in the organic law of 1875. In view of the care with which the electoral franchise was limited to males by the terms of the second section of the same article of the constitution, the omission of similar language, in negatively defining certain qualifications of office-holding, has a significance which tends toward the conclusion we have reached in this case. The constitution, we think, remits to the legislature the subject of proper qualifications to be possessed by the holders of such an office as is here in question. Art. 6, sec. 39.

Turning to the statute law we find this provision in regard to the qualifications of clerks of the county court, viz.: "Sec. 1965. Qualifications of a clerk.—No person shall be appointed or elected clerk of any court, unless he be a citizen of the United States, above the age of twenty-one years, and shall have resided within the State one whole year, and within the county for which he is elected three months before the election; and every clerk shall, after his election, reside in the county for which he is clerk." The above section and several other neighboring sections concerning clerks exhibit the words "he" and "his" in treating of these offices. But we do not regard that fact as of moment when we recall the general rule for construction of laws, above alluded to (section 6568). Women in Missouri have been licensed as attorneys-at-law by the supreme court. They have for years been recognized as eligible to office as notaries public. A woman now holds the responsible office of State librarian by appointment of the supreme court. Yet all of the laws under which such action has been taken display similar language to that in the law regarding clerks of courts from which the learned counsel for defendant seek to draw the inference that only males are eligible as such clerks. Rev. St. 1889, secs. 605, 607, 608, 7109, 7110, 8198, 8199, 8202.

The particular qualifications pointed out by section 1965 (except those of citizenship and age) are far less vital and important than that of sex. If the lawmakers had regarded sex as determining eligibility, it seems to us that they would have expressed themselves plainly to that effect, as they did in former years. They have so expressed themselves in other statutes; as, for instance, in the school law, which requires the directors in certain cities to have the qualifications of voters. Rev. St. 1889, sec. 8086. We have held that as males alone can be voters under the constitution of 1875, a woman is not eligible to be a school director under the section cited. State v. McSpaden (1897), not yet reported. The fact that in the law governing clerks of courts no similar requirement appears is a clear pointer to the conclusion that no such qualification was intended to be demanded. Moreover, the change which the legislature has made in the language of the law on this very subject has much meaning in solving the question before this division. In 1855 the present section 1965 had the form shown in the copy below. It so remained until 1879 when it was amended by dropping the words we have noted by italics, viz: "No person shall be appointed or elected clerk of any court, unless he be a *free white male* citizen of the United States, above the age of twenty-one years, and shall have resided within the State one whole year, and within the county for which he is elected, three months before the election; and every clerk shall, after his election, reside in the county for which he is clerk." (Rev. St. 1855, p. 336, sec. 10.) The dropping of the word "male," in describing the qualifications for such offices, has value as a guide to the legislative purpose in enacting the present law on this subject. Can there be any doubt as to the intended effect of such a change of the statute on the particular question before us? It is always allowable in interpreting statutes to consider the prior law as compared with the present, in endeavoring to reach the true intent of the legislature, which, when found, is the spirit of the law that the courts should enforce.

That women may be citizens of the United States and of Missouri is a proposition that requires no discussion at this day. Minor v. Happersett (1874), 21 Wall. 162; State v. County Court (1886), 90 Mo. 593, 2 S. W. Rep. 788. Mrs. Wheeler is a citizen of the United States and of this State. She is over the age of 21 years. She has resided in Missouri one year next preceding her election, and she possesses all the other qualifications named in section 1965. It is conceded

that she is in all respects qualified, barring the supposed objection on account of her sex. The office of clerk of a court is a ministerial office. It admits of the use of a deputy, and its duties are certainly not of such a nature as to be incompatible of discharge by a woman.

In view of the condition of the positive law of Missouri above described, we do not consider it necessary to enter into a discussion of the eligibility of women to office at the common law or in other States of the Union.

We regard the question at bar as one depending on the force and intent of the law of this State, organic and statutory. We hold that, under that law, there is no express or implied barrier to the election of a woman to such an office as that in question in this case, and that her fellow citizens may call her to discharge its duties if they see fit. Mrs. Wheeler is qualified to hold the office, and Mr. Hostetter is not entitled to retain it on the facts disclosed. Hence the demurrer will be overruled and judgment of ouster will be entered against defendant unless he plead further within ten days.* Macfarlane, Robinson and Brace, JJ., concur.

NOTE.—The foregoing decision does not purport to deal with the general subject of eligibility of women to public office beyond the scope of the positive law of Missouri. It abstains from any discussion of the *status* of woman in that regard at common law. The opinion assumes that women may become eligible to office without express enabling provisions of the constitution, where no intent to exclude them is manifest. The issue is treated simply as one as to the intent of the State law, organic and statutory. In Atchison v. Lucas, 83 Ky. 451, the court proceeded on exactly the contrary assumption, and reached the conclusion that women were not eligible to public office; accordingly a woman was refused in that case the office of jailor, after having received the highest vote therefor at an election. In Michigan it was held (1891) that, though none but an elector could be a county clerk, a woman might lawfully be appointed a deputy county clerk. Wilson v. Newton, 87 Mich. 493, 49 N. W. Rep. 869. Earlier decisions to the same general effect are there cited. In Warwick v. State (1874), 25 Ohio St. 21, women were declared eligible to appointment as deputy probate clerks. The eligibility of women to be notaries public is treated quite fully by Mr. Moak in an article (1890) on that subject (44 Alb. L. J. 244), which contains references to many early cases on the eligibility of women to office generally, in England and in this country. In Findley v. Thorn (1885), 1 How. Pr. (N. S.) 76, it was held that the right of a woman to be a notary could not be collaterally attacked; and in Nebraska (1894) the question of her eligibility as notary was said not to be properly raised by a mere objection in a judicial proceeding to the validity of an affidavit to which a female notary's certificate appeared; but the court further remarked: "We know of no constitutional provision or law that prohibits a woman in this State from holding the office of notary public." Van Dorn v. Mengedoht, 41 Neb. 525, 29 N. W. Rep. 800. While in Tennessee it was held (1893) that, without an enabling statute, a woman was not eligible to the office of notary. The court said: "Although a woman may be a citizen she is not entitled, by virtue of her citizenship, to take any part in the government, either as a voter or as an officer independent of legislation conferring such rights upon her." State v. Davidson, 92 Tenn. 531, 22 S. W. Rep. 203. The Supreme Court of Massachusetts (1890) took substantially the same view, in response to a question submitted by the governor and council. 150 Mass. 586, 23 N. E. Rep. 850. The Supreme Court of New Hampshire (1890) declared that by the law of England "no woman could, in person, take an official part in the government of the State, except as queen or overseer of the poor, without express authority of statute." But at the same time the court ruled that the vocation of attorney at law was not a public office, and women might therefore be licensed to practice law. *In re* Ricker, 66 N. H. 207, 29 Atl. Rep. 559.

In Colorado (1891) *held* that while women were not eligible to public office (under the constitution then in force, art. 7, sec. 6), they were eligible to admission as attorneys-at-law. *In re* Thomas, 16 Colo. 441, 27 Pac. Rep. 707. The Supreme Court of Indiana went further in 1893 and held (under a constitution limiting voting to males, art. 2, sec. 2, and declaring that, "every person of good moral character, being a voter, shall be entitled to admission to practise law in all courts of justice," art. 7, sec. 21), that a woman might be admitted to the bar. The circuit court had held the contrary. *In re* Leach, 134 Ind. 665, 34 N. E. Rep. 641. But in Massachusetts (1881) admission to the bar was denied to a woman in Robinson's Case, 131 Mass. 376, a ruling followed in Oregon. *In re* Leonard, 12 Oreg. 93, 53 Am. Rep. 323. The same result was reached in Wisconsin in the Goodell Case, 39 Wis. 232. The latter case was met by a statute under which Miss Goodell was admitted to practice. 48 Wis. 693. The Supreme Court of Connecticut held, however, in 1882, that women were eligible to admission as attorneys, without the aid of a statute. *In re* Hall, 50 Conn. 131. Later the legislature of that State enlarged the sphere of office holding for women by providing that "no person shall be deemed to be disqualified from holding the offices of assistant town clerk, registrar of births, marriages, and deaths, or of assistant registrar of births, marriages, and deaths, by reason of sex" (Laws, 1889, ch. 179). The Supreme Court of the United States has declared that the right of admission to the bar is not a privilege or immunity secured by the federal constitution to women as citizens of the United States. *In re* Lockwood, 154 U. S. 116. A woman was held (by a divided court) eligible to be master in chancery in Illinois (1881). Schuchardt v. People, 99 Ill. 501. In California women were held entitled to admission to the college of law. Foltz v. Hoge (1879), 54 Cal. 28. In Wisconsin, women, whether married or single (authorized to practice as attorneys) were enabled to act as court commissioners, assignees or receivers in certain classes of cases, by the laws of 1891, ch. 34, 119. By statute in Washington it is declared that no person shall be disqualified on account of sex from pursuing any business, profession or employment, except public office. Laws 1889-90, p. 519. But under another statute (Laws 1889-90, p. 348), it has been held that women are eligible to the office of school superintendent. Russell v. Guptill (1896), 13 Wash. 360.

In Huff v. Cook, 44 Iowa, 639, a woman was pronounced eligible to the office of county superintendent of common schools under a law declaring that "no person shall be deemed ineligible by reason of sex, to any school office in the State of Iowa," which was held (1876) to be constitutional. The constitution of

*No further pleading was filed.

Minnesota was construed to permit women to hold such offices. State v. Gorton, 33 Minn. 345. A similar ruling was made in Wright v. Noell, 16 Kans. 601. In Massachusetts (1874) the justices of the supreme court answering a question of the house of representatives whether a woman could be a member of a school committee, under the constitution of that State, replied in the affirmative. 115 Mass. 602. In Oregon an act (Laws, 1893, p. 62) purporting to make women eligible to any "educational office" in that State, was held (1896) unconstitutional, as in conflict with the requirement that no person should be elected or appointed to a county office who was not "an elector" of the county, electors being defined as male citizens (art. 2, sec. 2, and art. 6, sec. 8). State v. Stevens, 29 Oreg. 464, 44 Pac. Rep. 898. In Pennsylvania, women are eligible to offices of control or management under the school laws of the State (Const. Art. 10, sec. 3); but this does not limit the local school board in its exercise of control in the choice of teachers. Com. v. Jenks, 154 Pa. 368, 26 Atl. Rep. 371. Touching the right of women to vote at school elections, the following cases may be consulted, some of which contain remarks that persons investigating the subject of the principal case may find it of advantage to see: State v. Cones, 15 Neb. 444, 19 N. W. Rep. 682; Belles v. Burr, 76 Mich. 1, 43 N. W. Rep. 24; Wheeler v. Brady, 15 Kans. 26; People v. English (1892), 139 Ill. 632; Isaacs v. McNeil, 44 Fed. Rep. 32; Gilkey v. McKinley, 75 Wis. 543, 44 N. W. Rep. 762; Plummer v. Yost (1893), 144 Ill. 68.

CORRESPONDENCE.

LIABILITY OF CARRIER TO GRATUITOUS PASSENGERS.

To the Editor of the Central Law Journal:

In reference to the interesting article by Mr. Charles Hebberd, in a recent number of your JOURNAL (Vol. 44, No. 10), on the subject of the Liability of Common Carriers to Passengers Carried Gratuitously, permit me to say: There seems to be but little variance in the result reached by the various courts, except in cases where there is an agreement so called, limiting the carrier's liability, and it is only to such cases that my remarks will apply. It is said that a pass given a passenger is a gratuity that there is no consideration moving to the carrier, and that, therefore, he is not liable. Is it not a fact that a pass is but rarely given except where the carrier thinks he will derive some advantage by giving the pass in the way of gaining business or influence or some other thing? Where do we hear or know of railway officials carrying their friends free unless for a valuable consideration, indirect though it may be. Ought not this phase of the matter to be considered in deciding cases involving free passes? Again, it is said that there is an agreement between the carrier and the passenger carried free, and this agreement should be enforced. I suppose, to make the contract binding, the minds of the contracting parties must meet. Do they ever do this in these cases? Does not a man receive a pass and use it, no matter what terms are on it? The only evidence of the passenger agreeing to the terms is the fact that he uses the pass. I suppose there are but few, if any, cases where he goes to the railway official and actually agrees to the terms on the pass. Does not a man take a bill of lading and make use of it, and yet not agree to many of the clauses in it, and will any court hold him to every clause that is in ordinary bills of lading? It is urged that the courts of Connecticut, Massachusetts, New York, New Jersey, enforce such terms on passes, but is it not well known that railway corporations have very great influence in those States, and always have had? But, lastly, is it not against public policy to permit carriers to enforce such alleged contracts? By such an agreement, if enforced, a man's wife and his children lose their all, if the man be killed in an accident and he leave no means of support; these helpless ones have no recourse against the railroad. A man's life has a value as a citizen, not to himself alone, but to those dependent on him. Ought he to be permitted to make such a contract when he has infant children to support for the mere gratification of riding on a free pass? The law in most places gives men of family certain exemptions from execution for debt. These exemptions he cannot contract away. They are for the protection of his wife, his children. And yet is he to be permitted to accept a free pass on such terms as to endanger the whole living of those dependent on him? And to serve what end is the law thus strained? It seems clear that public policy should forbid that the rights and welfare of little children and weak women should thus suffer merely to encourage large corporations in their efforts to defeat just claims arising from their negligence.

C. W. WATTS.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

ARKANSAS....40, 52, 130
COLORADO....38, 89, 93
FLORIDA....6, 29
ILLINOIS....64, 108
INDIANA....7, 20, 28, 44, 100, 114, 127
INDIAN TERRITORY....86
IOWA....8, 21, 31, 32, 35, 36, 72, 92, 94, 122
KANSAS....4, 71
KENTUCKY....19, 47, 51, 57, 63, 69, 82, 88, 123, 126, 129
LOUISIANA....46, 49, 79, 83
MARYLAND....132
MASSACHUSETTS....104
MICHIGAN....2, 11, 22, 55, 58, 78, 91, 102, 109, 116, 121
MINNESOTA....53
MISSISSIPPI....9, 16, 17, 26, 38, 66, 96, 117
MISSOURI....3, 56, 74, 101, 107, 115, 118
MONTANA....30, 34, 73
NEBRASKA....12, 14, 15, 18, 61, 76, 85, 90, 95, 98, 99, 124, 131, 135
NEW JERSEY....23, 84, 105
NORTH DAKOTA....1, 67
OREGON....5
PENNSYLVANIA....62, 134
SOUTH CAROLINA....27, 60
TENNESSEE....37, 111, 112, 125
TEXAS....10, 39, 42, 43, 45, 48, 50, 59, 70, 75, 77, 81, 110, 113
UNITED STATES C. C....97, 106, 120
UNITED STATES C. C. OF APP....13, 119
UNITED STATES S. C....24, 25, 41, 54, 65, 128
WISCONSIN....68, 80, 87, 103, 133

1. ADVERSE POSSESSION—Lands in Indian Country.—There can exist no "adverse possession" of lands, in a private party, while such lands are a portion of the "Indian country," and the right of occupancy in the Indians has not been terminated by the United States. —KREUGER v. SCHULTZ, N. Dak., 70 N. W. Rep. 269.

2. ADVERSE POSSESSION — Parol Gift. — Where the donee of lands under a parol gift goes into possession, and claims to be the owner, there is the beginning of an adverse possession against the donor.—SCHAFER v. HAUSER, Mich., 70 N. W. Rep. 136.

3. APPEAL—Supreme Court—Jurisdiction.—As appeals from convictions for felonies lie to the supreme court, and an action to enforce a recognizance is a continuation of the criminal proceeding, an appeal from a judgment of forfeiture of a recognizance to answer to the charge of felony lies to the supreme court.—STATE v. HOEFFNER, Mo., 38 S. W. Rep. 1109.

4. APPEAL—Waiver of Right.—A party against whom a money judgment has been recovered, and who procures an order of court for the partial satisfaction of the same by setting off against it a like judgment in his own favor for a smaller amount, will be held to have thereby recognized the validity and justice of such judgment against himself, and to have waived his right to prosecute error therefrom.—KANSAS CITY, FT. S. & M. R. CO. v. MURRAY, Kan., 47 Pac. Rep. 885.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS — Preferences. — Mortgages executed by a failing debtor to particular creditors immediately prior to a general assignment, which the debtor did not then contemplate, and accepted in good faith, to secure a *bona fide* debt, are not parts of the assignment, so as to invalidate the same, under Hill's Ann. Laws, § 8173, declaring that no general assignment shall be valid, unless made for the benefit of all the creditors.—INMAN, POULSEN & CO. v. SPRAGUE, Oreg., 47 Pac. Rep. 826.

6. ASSIGNMENT FOR CREDITORS. — The validity of an assignment for the benefit of creditors may be tested in garnishment proceedings against the assignee.—DORR v. SCHMIDT, Fla., 21 South. Rep. 279.

7. ASSIGNMENT FOR CREDITORS — Attachment by Foreign Creditors.—A non-resident creditor cannot prosecute his claim against the assignee for creditors, pending attachment proceeding in another State, instituted by him after the assignment, against property included in the assignment. — COMBS v. NEW ALBANY RAIL MILL CO., Ind., 46 N. E. Rep. 16.

8. ATTACHMENT — Levy — Notice. — Notice of attachment, required by Code, § 2967, to be served on defendant, may be served within a reasonable time after the actual seizure of or levy on the property. — CITIZENS' NAT. BANK OF DES MOINES v. CONVERSE, Iowa, 70 N. W. Rep. 200.

9. ATTACHMENT — Seizure of Property Claimed by.—A successful claimant of property seized on an attachment against another cannot recover attorney's fees and expenses incurred by him in defending his claim, in an action on an indemnifying bond given the sheriff on such seizure by the plaintiff in attachment, in the absence of proof that the attachment was a malicious or willful wrong.—MOORE v. LOWREY, Miss., 21 South. Rep. 237.

10. BANKS — Check — Assignment of Fund.—A check given on a bank in which the drawer has funds is an assignment of so much thereof as is necessary for its payment. — DOTY v. CALDWELL, Tex., 38 S. W. Rep. 1025.

11. BANKS — Insolvency — Preferences. — To bring a case within 3 How. Ann. St. § 8208e6, providing that payments by a bank, "either after the commission of an act of insolvency or in contemplation thereof, with a view to the preference of one creditor over another," are void, there must be, not only an act or a contemplation of insolvency, and a payment resulting in a preference, but the payment must be made with a view to create the preference.—STONE v. JENISON, Mich., 70 N. W. Rep. 149.

12. BANKS—Insolvency—Stockholders.—In a proceeding under chapter 8, Comp. St., to wind up an insolvent banking corporation, the corporation, even after consenting to the appointment of a receiver, remains an interested party, and may be heard to resist an application for an order conferring authority upon the receiver not within the original order appointing him. —STATE v. GERMAN SAV. BANK, Neb., 70 N. W. Rep. 211.

13. BANKS AND BANKING — Powers of Cashier — Renewal of Notes. — The cashier of a bank, who, in addition to his usual powers, is, in the absence of the president, running the bank under the advice of the executive committee, has authority to bind the bank by a contract to renew notes, in consideration of the release by the indorser of a lien on the maker's property.—BANK OF COMMERCE v. BRIGHT, U. S. C. C. of App., Third Circuit, 77 Fed. Rep. 947.

14. BILL OF SALE — Bona Fide Purchaser. — A bill of sale received in payment of an antecedent debt protects the vendee to the same extent as had there been a new consideration, if taken in good faith, and without an intention to defraud the other creditors of the vendor.—RACHMAN v. CLAPP, Neb., 70 N. W. Rep. 208.

15. BILLS AND NOTES—Construction.—In an action on a promissory note or other written agreement, a contemporaneous contract in writing, connected therewith by direct reference or by necessary implication, is admissible as part of the transactions involved.—SEIEROE v. FIRST NAT. BANK OF KEARNEY, Neb., 70 N. W. Rep. 220.

16. CARRIERS — Injury to Freight in Shipment. — A shipper of freight may waive his contract, and sue the carrier in tort for an injury to the property in transit, resulting from gross or willful negligence.—WATERS v. MOBILE & O. R. CO., Miss., 21 South. Rep. 240.

17. CARRIERS — Passenger.—A carrier cannot reject a person as a passenger, otherwise qualified, on the sole ground that he is blind. — ZACKERY v. MOBILE & O. R. CO., Miss., 21 South. Rep. 246.

18. CARRIERS OF GOODS—Connecting Lines.—A railroad company receiving for shipment goods consigned to a point on the line of a connecting carrier under an agreement to transport them to the terminus of its own road is neither at common law nor by statute of this State answerable therefor after their safe delivery to the connecting line named in the bill of lading or contract of shipment.—FREMONT, E. & M. V. R. CO. v. WATERS, Neb., 70 N. W. Rep. 225.

19. CARRIERS OF PASSENGERS—Street Railways—Negligence. — Contributory negligence of a street railway passenger in projecting his arm out of the car window, whereby it was struck by a bridge, will not prevent recovery, where the conductor neglected to give warning, though seeing his danger in time.—SOUTH COVINGTON & C. ST. RY. v. MCCLEAVE, Ky., 38 S. W. Rep. 1055.

20. CHATTEL MORTGAGE—Recording Assignment.—In an action by a chattel mortgagor for conversion of goods mortgaged by a firm doing business in G county, an averment that the mortgage was recorded in G county was insufficient to show that the mortgage was recorded where the partners resided, as required by statute.—MORRIS v. ELLIS, Ind., 46 N. E. Rep. 41.

21. CHATTEL MORTGAGES—Validity against Creditors.—A recorded chattel mortgage is not fraudulent where possession of the property is retained by the mortgagor, though the instrument giving him right to possession is separate from the mortgage, and not recorded.—GILMORE v. KILPATRICK-KOCK DRY-GOODS CO., Iowa, 70 N. W. Rep. 175.

22. CONFLICT OF LAWS.—Where defendant was constructing a tunnel under the St. Clair river, and sent plaintiff, who was in its employ on the American side, to the Canadian side, to work at that entrance of the tunnel, the right of recovery of plaintiff for negligence of defendant in allowing him to enter on dangerous work there is governed by the laws of Canada.—TURNER v. ST. CLAIR TUNNEL CO., Mich., 70 N. W. Rep. 146.

23. CONSTITUTIONAL LAW — Contracts — Officers.—An appointment to a public office is not a contract the impairment of the obligation of which is forbidden by the federal constitution.—STATE v. HUDSPETH, N. J., 36 Atl. Rep. 662.

24. CONSTITUTIONAL LAW — Control of Navigable Waters.—The States have full power as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by congress of authority to the contrary.—LAKE SHORE, ETC. RY. CO. v. STATE OF OHIO, U. S. S. C., 17 S. C. Rep. 357.

25. CONSTITUTIONAL LAW — Penalty for Non-payment of Taxes.—The provision of Act Ind. March 6, 1893, § 11, that judgment against a telegraph company in an action in the name of the State, on relation of the county auditor, for unpaid taxes, shall include a penalty of 50 per cent. of the amount of the tax, is not unconstitutional.—WESTERN UNION TEL. CO. v. STATE OF INDIANA, U. S. S. C., 17 S. C. Rep. 345.

26. CONTRACTS—Mutuality.—A unilateral agreement of a landowner constituting an exclusive agent for the sale of the land within a specified time, which agent is to receive a commission, regardless of who effects the sale, and is to be aided by the owner in making a sale, lacks mutuality, and hence is revocable at any time before the agent procures a purchaser.—KOLB v. BENNETT LAND CO., Miss., 21 South. Rep. 238.

27. CONTRACT — Quantum Meruit.—In an action on a written contract for five years' services, an instruction that if the contract was verbally modified, except in respect to the term of service, it would be void under the statute of frauds, "but the plaintiff would be entitled, nevertheless, to recover the value of his services," is erroneous, as it allows in an action on a special contract a recovery on a *quantum meruit*.—BIRLANT v. CLECKLEY, S. Car., 26 S. E. Rep. 600.

28. CONTRACT — Reformation.—A decree reforming a contract fixing the boundary between adjoining landowners, on the ground of mutual mistake, is sustained by findings that when the contract was made neither party knew the location of the true dividing line, that it had been previously obliterated, but was located more than 100 feet in plaintiff's favor from the line as fixed in the contract, and that the parties believed that the contract line was correct, though there were no words in the contract which the parties did not intend to include, and none were omitted which they intended to include.—PHILLIP ZORN BREWING CO. v. MALOTT, Ind., 46 N. E. Rep. 23.

29. CONTRACT—Rescission—Fraud.—To authorize the rescission of a contract on the ground that it was procured by false representations, the false assertions must be in regard to existing facts; and the non-performance of a mere promise, without fraudulent intent, to do something in the future, in consideration of the execution of the contract, will not be sufficient to authorize its rescission.—HARRINGTON v. RUTHERFORD, Fla., 21 South. Rep. 283.

30. CONVERSION.—Where, in an action for conversion, plaintiff alleges his ownership of the property, and defendant denies it, and pleads a purchase of the property from another with plaintiff's knowledge, and without objection by him, testimony to prove notice to defendant of plaintiff's claim and rights before the purchase is proper evidence in rebuttal.—LAUBENHEIMER v. BACH, CORY & CO., Mont., 47 Pac. Rep. 803.

31. CORPORATIONS—Dissolution — Receivers.—Where the stock of a corporation is owned by two persons, and the corporation owns stock in a second corporation, and one of the holders of the stock in the first corporation was deposed as an officer in the second corporation by the majority vote of the stockholders therein, a disagreement between him and the other stockholder, not as to the management of the first corporation, but because of the effect it might have upon the affairs of the second corporation, is no ground for appointing a receiver of the first corporation to take charge of the stock owned by it in the second corporation.—WALLACE v. PIERCE-WALLACE PUB. CO., Iowa, 70 N. W. Rep. 216.

32. CORPORATION — Evidence.—Acts of a board of directors may be shown by parol, when no record of them has been made.—ZALESKY v. IOWA STATE INS. CO., Iowa, 70 N. W. Rep. 187.

33. CORPORATIONS—Foreign Insurance Companies.—Where a statute provides that foreign corporations shall file certain certificates with the secretary of state and the recorder of deeds in counties, under penalty, and there is no provision declaring contracts entered into without such filing illegal, contracts made by such corporations without compliance with the statute are valid.—ROCKFORD INS. CO. v. ROGERS, Colo., 47 Pac. Rep. 848.

34. CORPORATION — Insolvent Corporations.—In the absence of statutory prohibition, an insolvent corporation may make a general assignment for the benefit of creditors, with preferences.—AMES & FROST CO. v. HESLET, Mont., 47 Pac. Rep. 805.

35. CORPORATIONS — Liability of Stockholders.—McClain's Code, § 1628, providing that a transfer of stock shall not exempt the person making it from any liability of the corporation created prior thereto, applies to the liability to the corporate creditors after the corporate property is exhausted, to the amount remaining unpaid on the stock; and bonds issued by the corporation previous to such transfer, though not matured at that time, constitute a "liability," within the statute.—WHITE v. GREENE, Iowa, 70 N. W. Rep. 182.

36. CORPORATIONS — Ultra Vires — Ratification.—A mercantile corporation may, in course of business, accept stock of another corporation in exchange for goods which it is authorized to sell.—WHITE v. G. W. MARQUARDT & SON, Iowa, 70 N. W. Rep. 193.

37. COVENANTS — Breach — Damages.—Where the grantor in a deed containing a covenant of seisin in fee has a life estate only, in an action by the grantee in possession, in the lifetime of the grantor, to recover the purchase money, and for improvements, defendant must be allowed the rental value of the premises from the inception of such possession to the date of the decree.—CURTIS v. BRANNON, Tenn., 38 S. W. Rep. 1073.

38. CRIMINAL EVIDENCE — Homicide.—Where defendant has pleaded self-defense after deceased had drawn a knife, evidence that, after witness and defendant had gone to the scene, at night, several hours after the homicide, defendant, searching around in the dark, said that he found a large knife, is inadmissible.—KING v. STATE, Miss., 21 South. Rep. 235.

39. CRIMINAL EVIDENCE — Homicide — Confessions.—That S tried to induce defendant to make a confession, stating that it would not be used against her, is no ground for rejecting her confession made next day to another; it not being shown that S was an officer, or was present, or had any authority or influence over her.—CARLISLE v. STATE, Tex., 38 S. W. Rep. 991.

40. CRIMINAL EVIDENCE—Homicide — Dying Declarations.—Dying declarations are admissible only as to facts which the deceased would have been competent to testify to as a witness if living, and a statement made by a dying person that he knew he had been poisoned by defendant, because defendant had given him a drink of whisky which tasted nasty, and because he was taken sick shortly afterwards, is a statement of an opinion, and inadmissible.—BERRY v. STATE, Ark., 38 S. W. Rep. 1038.

41. CRIMINAL EVIDENCE — Homicide — Expert Evidence.—After a witness has once qualified himself as an expert, and given his own professional opinion in reference to what he has seen and heard, or upon hypothetical questions, it is then within the court's discretion to limit further interrogatories as to what other scientific men have said on such matters, or in respect to the general teachings of science thereon.—DAVIS v. UNITED STATES, U. S. S. C., 17 S. C. Rep. 360.

42. CRIMINAL EVIDENCE—Theft—Statements of Co-defendant.—Statements by co-defendant, though made

in the absence of defendant, that they had agreed to steal the property and divide the proceeds, may be admitted as part of a conversation, another part of which defendant had put in evidence, where it throws light on the part introduced by him.—TERRY v. STATE, Tex., 38 S. W. Rep. 986.

43. CRIMINAL LAW — Assault — Deadly Weapon. — A charge that a deadly weapon is one which, from the manner used, is calculated to produce death, "or serious bodily injury," is not erroneous on the ground that the weapon, as used, must be capable of producing death, where the evidence shows that the assault was with a shotgun, and a witness testifies that the gun, as loaded, and at the distance defendant was from the prosecutor, was a deadly weapon. — WILSON v. STATE, Tex., 38 S. W. Rep. 1014.

44. CRIMINAL LAW — Bail — Presumptions. — Under Const. § 62, providing that murder is not bailable when the proof is evident, or the presumption is strong, persons indicted for murder and applying for bail have the burden of showing that the proof is not evident, or the presumption strong.—BROWN v. STATE, Ind., 46 N. E. Rep. 34.

45. CRIMINAL LAW — Former Jeopardy. — Defendant was not placed in jeopardy, where a *nol. pros.* was entered, because of a defective indictment, after the parties had announced "Ready for trial."—JACKSON v. STATE, Tex., 38 S. W. Rep. 1002.

46. CRIMINAL LAW—Insanity—Burden of Proof.—The law presuming sanity, the burden is on the accused urging his insanity as a defense to prove it.—STATE v. SCOTT, La., 21 South. Rep. 271.

47. CRIMINAL LAW—Jurisdiction.—Where an attempt to commit murder by administration of poison in another State is supposed by the guilty party to have been successful, and he brings the victim into Kentucky, and beheads her for the purpose of concealing his crime, he can be convicted of murder in Kentucky though he did not suppose at the time of the beheading that she was alive.—JACKSON v. COMMONWEALTH, Ky., 38 S. W. Rep. 1091.

48. CRIMINAL LAW—Threats—Charging Criminal Offense.—An indictment for sending, with intent to extort money, etc., a letter threatening to charge another with a criminal offense, setting out the letter, but which fails to allege the specific offense threatened to be charged therein, is insufficient.—COHEN v. STATE, Tex., 38 S. W. Rep. 1005.

49. CRIMINAL PRACTICE—Homicide—Indictment.—In charging an intent to murder it is not required to set out the essential descriptions of the crime of murder. It is sufficient that the intent be charged as willfully, feloniously, and with malice aforethought. Where the weapon used is a club, in describing its use it is not open to objection that the indictment charges an assault with it.—STATE v. EDMUNDS, La., 21 South. Rep. 266.

50. DEATH BY WRONGFUL ACT—Damages.—Where a wife, and mother of a minor child, was killed through the negligence of another, the fact that the husband and father remarried one who filled the wife's place in all respects did not mitigate the damages for which the wrongdoer was liable to husband and child.—GULF, C. & S. F. RY. CO. v. YOUNGER, Tex., 38 S. W. Rep. 1121.

51. DEED—Fraud—Remainder-man's Interest.—A deed by a remainder-man of his interest to the life-tenant will not be set aside for inadequacy of price where the remainder-man was informed before the sale of the value of the property, and no fraud is shown.—WARE v. FRON'S ADMR., Tex., 38 S. W. Rep. 1061.

52. DEED—By Father to Minor Child.—A conveyance by a father, or by his direction, to his minor children, operates as a present advancement, although the father retains possession and improves the property; and he can be held to account for the rents and profits of the same during the minority of the grantees.—RHEA v. BAGLEY, Ark., 38 S. W. Rep. 1039.

53. DIVORCE—Alimony.—Under Gen. St. 1894, § 4807, the aggregate award and allowance made to the wife from the estate of her husband in actions for divorce cannot in any case exceed in present value the one-third part of the personal estate of the husband and the value of her dower in his real estate; and, in estimating the value of this estate, the husband's income from professional services cannot be considered.—WILSON v. WILSON, Minn., 70 N. W. Rep. 154.

54. EJECTMENT — Legal Defenses. — Defendant in ejectment cannot enjoin the action on the ground that the certification of the land by the government to the State, through which plaintiff claims title, is void, as that defense is available in the ejectment suit.—DEWEESE v. REINHARD, U. S. S. C., 17 S. C. Rep. 340.

55. ELECTION OF REMEDIES.—Where a creditor has taken a chattel mortgage for goods sold by him, and has brought suit in chancery for a receiver, and has recovered a judgment at law, he cannot then sue for a conversion of the goods, on the ground that title had not passed.—MCDONALD v. PRESTON NAT. BANK, Mich., 70 N. W. Rep. 148.

56. EMINENT DOMAIN—Municipal Corporations.—Under Const. art. 12, § 14, which declares that all railways are "public highways, and all railroad companies common carriers," a switch track constructed in a public alley, on an established grade, by authority of a city, connecting with the main line, and operated by the railroad company, is for public use, and hence not a nuisance, though the ordinance granting the license provided that no cars should be set on the switch, except for the use of the adjoining property owners, nor be allowed to stand thereon for any length of time between certain streets, beyond which were facilities for standing cars on private property.—BROWN v. CHICAGO GREAT WESTERN RY. CO., Mo., 38 S. W. Rep. 1099.

57. EMINENT DOMAIN—Railroads—Streets.—The construction of a railroad to be operated by steam on a street is not an additional servitude; hence, when an entry is made for that purpose without warrant, it is a public nuisance, which cannot be enjoined by an abutter.—DULANEY v. LOUISVILLE & N. R. CO., Ky., 38 S. W. Rep. 1050.

58. EQUITY—Disputed Boundary.—Equity has jurisdiction of a bill to quiet title to certain land in possession of complainant, and to enjoin defendant from entering upon the same and building a driveway thereon, where plaintiff has no adequate remedy at law, and alleges the damages to be irreparable, though the question of fixing a boundary line is in issue.—CAMPBELL v. ADSIT, Mich., 70 N. W. Rep. 141.

59. EQUITY—Practice.—A bill will not lie to impeach an order of a chancellor in another action holding for naught findings of a jury on issues submitted on defendant's demand because no proper decree could be entered thereon, and continuing a motion by defendant for a new trial, though such order was *coram non judice*.—CONNOR v. FRIERSON, Tenn., 38 S. W. Rep. 1031.

60. ESTOPPEL—By Deed.—A husband giving a mortgage on his wife's lands, and describing them as his own therein, is estopped to deny ownership.—HOLLAND v. JONES, S. Car., 26 S. E. Rep. 606.

61. EVIDENCE—Parol Evidence.—A general indorsement of commercial paper may except as against a *bona fide* holder, be explained, and the precise terms of the agreement shown, by parol evidence.—WHITNEY v. SPEARMAN, Neb., 70 N. W. Rep. 240.

62. EXECUTION—Priorities.—Where an execution is delivered with directions to realize thereon, the lapse of two return days between the levy and sale, and the fact that the officer permitted defendant meanwhile to keep the goods and conduct his business as usual, and that plaintiff did not rule the officer to return the writ, will not postpone the lien.—GILLESPIE v. KEATING, Penn., 36 Atl. Rep. 641.

63. EXECUTION—Sale on Execution.—Where an officer

sells property under a judgment in attachment which is afterwards set aside on appeal, he can, in an action for damages, show that the proceeds of the sale were applied to the payment of the debt of defendant in attachment.—ASHCRAFT v. ELLIOTT, Ky., 38 S. W. Rep. 1062.

64. EXECUTION SALE—Homestead.—On motion to vacate a sale on execution, an affidavit reciting that the premises "are" occupied by affiant as her residence, and "constitute" the homestead of herself and family, and that she and her husband and children "occupy" the same as their residence, etc., does not show that the premises were so occupied when the judgment became a lien, and is therefore insufficient.—ZANDER v. SCOTT, Ill., 46 N. E. Rep. 2.

65. FEDERAL OFFENSE—Improper Use of Mails.—A charge that defendant "knowingly deposited" in the mails a printed book, etc., "the character of which is so obscene, lewd, and lascivious" that it would be offensive to set it forth in the indictment, sufficiently charges, after verdict, both that the book is in fact obscene, etc., and that defendant knew it to be so.—PRICE v. UNITED STATES, U. S. S. C., 17 S. C. Rep. 866.

66. FRAUDS, STATUTE OF—Sale of Growing Timber.—A parol sale of growing timber, to be cut and removed, is void under the statute of frauds, as involving an interest in the land.—WALTON v. LOWRY, Miss., 21 South. Rep. 243.

67. FRAUDULENT CONVEYANCES—Parties.—In an action brought by judgment creditors of the grantors to set aside conveyances of real estate as fraudulent and void, and in which no accounting for rents and profits is asked, it is not necessary to bring in as a party defendant a receiver of the rents and profits of said real estate, appointed long after the conveyances were made, and in an action to which none of the plaintiffs in this action were parties.—DAISY ROLLER MILLS v. WARD, N. Dak., 70 N. W. Rep. 271.

68. GARNISHMENT—Liabilities Subject to.—A cause of action for personal injuries through negligence is within Rev. St. § 4253, as amended by Laws 1887, ch. 280, providing that actions for assault and battery, etc., "or other damage to the person," shall survive, and is assignable before judgment.—LEHMAN v. DEUSTER, Wis., 70 N. W. Rep. 170.

69. HOMESTEAD — Proof of Setting Apart.—A claim that land is subject to a judgment because it was set apart as a homestead to the judgment debtor, and his wife occupied it after her husband's death, and until her own death, under such homestead right, is not supported where no legal proceedings setting apart the homestead are shown, but proof is made that the land was sold under a judgment against the husband in his lifetime, and the purchaser was placed in possession by the court; the right under which the wife and her heirs have claimed and occupied it since not appearing.—FORTH v. LIGHTFOOT, Ky., 38 S. W. Rep. 1071.

70. HOMESTEAD — Vacant Lot.—A decree enjoining the sale of a lot as apart of plaintiff's homestead cannot be sustained, where the lot was vacant, and the only evidence that it was used as a home, within the constitution, was that it was used for garden purposes, but there was no evidence that the products thereof were for home use.—STEVES v. WHITAKER, Tex., 38 S. W. Rep. 1026.

71. HUSBAND AND WIFE — Duress of Wife.—The defense of duress is available to the wife in an action to foreclose a mortgage upon the homestead which she was compelled to sign through fear of bodily harm and abandonment by her husband, although it was given to secure the payment of a negotiable promissory note that had been transferred to an innocent holder before maturity.—BERRY v. BERRY, Kan., 47 Pac. Rep. 837.

72. HUSBAND AND WIFE—Fraudulent Conveyances.—Where a husband purchases land with his wife's money, and takes title with her knowledge, and she testifies that she always regarded him as the owner, and there was no agreement for the return of the money nor transfer of the property to the wife, it constitutes the property of the husband as regards creditors.—ROANE v. HAMILTON, Iowa, 70 N. W. Rep. 181.

73. HUSBAND AND WIFE—Rights of Husband's Creditors.—Part of a track pre-empted by a husband was sold, and one-half the proceeds, which had been deposited to the wife's credit, was afterwards turned over to the husband, with the understanding that he should improve the remaining portion of the land therewith, and convey to his wife when requested; but the record title remained in his name for nine years thereafter, during which period the improvements were made: Held, that a subsequent conveyance to the wife was subject to the debts incurred by the husband for materials which went into the improvements, and which were furnished on the strength of his apparent ownership.—HOLTER v. WASSWEILER, Mont., 47 Pac. Rep. 806.

74. INJUNCTION—Adequate Remedy at Law.—Where a road overseer appropriates land to drain a public road under Rev. St. 1889, § 7820, providing for such an appropriation and for filing exceptions by the party aggrieved by the assessment of damages in the county court, and the owner files exceptions in such court, and moves to dismiss the proceedings, and the motion is overruled, and plaintiff refuses to prosecute her exceptions, an injunction restraining the overseer from proceeding is erroneous, as the landowner has an adequate remedy at law.—SHOPPERT v. MARTIN, Mo., 38 S. W. Rep. 967.

75. INJUNCTION—Damages.—A contractor being enjoined from moving a house by one with notice of the contract, and the then position of the house on a beach, may recover as damages the value of his time thereby lost, the wages of men for such extra time as he was obliged to pay them on account thereof, the expense of protecting the house from the sea, and the value of apparatus lost by high tide, without fault of his, while thus protecting it.—GALVESTON CITY R. CO. v. MILLER, Tex., 38 S. W. Rep. 1132.

76. INSOLVENCY — Preferences.—A creditor may take such lawful steps as he deems best to secure the payment of a debt owing to him; and, if the creditor's only motive be the honest one of securing his debt, he will not be guilty of fraud because the effect of securing or paying his debt is to leave some other creditor's debt partly or wholly unpaid.—H. T. CLARKE DRUG CO. v. BOARDMAN, Neb., 70 N. W. Rep. 248.

77. INSURANCE — Appraisement of Loss.—Under a policy providing for ascertaining loss by appraisement, and that any proceeding relative to appraisement shall not waive any condition of the policy, denial of liability by the insurer, after appraisement of loss, on the ground of breach of condition of the policy, does not waive its right to insist on the appraisement as conclusive of the amount of loss.—AMERICAN CENT. INS. CO. v. BASS, Tex., 38 S. W. Rep. 1119.

78. INSURANCE—Goods Bought on Credit.—A person who has bought goods on credit may insure them for the benefit of the seller when the insurer agrees to the arrangement.—GUITERMAN v. GERMAN-AMERICAN INS. CO., Mich., 70 N. W. Rep. 135.

79. INTOXICATING LIQUORS — License.—A person who raises grapes, and manufactures them into wines, and sells the same at his place of business, in either barroom or grocery, is liable to pay a license tax therefor.—TOWN OF MANDEVILLE v. BAUDOT, La., 21 South. Rep. 258.

80. INTOXICATING LIQUORS—License — Revocation.—One of three members of a town board of supervisors, who hires a minor to purchase liquor, so as to obtain evidence against the dealer of selling to minors, is incompetent to sit as a member on a hearing to revoke the dealer's license for selling to minors; so that, he sitting, the action of the board revoking his license is void.—STATE v. BRADISH, Wis., 70 N. W. Rep. 172.

81. INTOXICATING LIQUORS—Place of Sale.—Where intoxicating liquors are ordered in a local option dis-

trict, to be shipped C. O. D. from an outside point, the purchaser to pay expressage, the sale is complete at the point of shipment.—FRESHMAN v. STATE, Tex., 38 S. W. Rep. 1007.

82. JUDGMENT — Collateral Attack — Limitations.—Limitations cannot be pleaded by a junior mortgagee, in a suit to foreclose his mortgage, to annul the decree of the court in which the senior mortgage was foreclosed nearly 10 years before, where it is not claimed that the statute barred the first suit at the time it was brought, but merely that the mortgage debt was merged in the judgment debt, and that he was not made a party to the first suit.—GAULT v. EQUITABLE TRUST CO. OF NEW LONDON, CONN., Ky., 38 S. W. Rep. 1065.

83. JUDICIAL SALES — Rights of Purchaser.—A purchaser at a judicial sale, who, before paying the price, or entering into the possession of the thing sold, discusses illegalities in the proceedings which have led to the sale, calculated to throw a cloud upon his title, may refuse to execute the purchase.—SUCCESSION OF NASH, La., 21 South. Rep. 254.

84. LANDLORD AND TENANT.—An affidavit "that the tenant is in possession of the demised premises, and that he has held and occupied the same from on or about the first day of April, 1892, as tenant of deponent, and without any special agreement for the termination of the said possession, the said tenant paying the deponent the rent of seventeen dollars therefor monthly up until the time of default," does not show an agreement to pay the rent monthly, whereby the tenancy may become a monthly tenancy.—STATE v. WILLIAMSON, N. J., 36 Atl. Rep. 665.

85. LANDLORD AND TENANT—Holding Over.—When a tenant, with the consent of his landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy for another like term, and upon the same conditions. But this presumption is not a conclusive one, and may be overthrown by evidence that the tenant's holding over was in pursuance of an agreement with his landlord that he might so hold over, and pay rent only for the time he occupied.—BRADLEY v. SLATER, Neb., 70 N. W. Rep. 258.

86. LANDLORD AND TENANT — Lease by Indian—Estoppel.—Where purchasers of land, in possession of defendant under an oral lease which provided for possession for a certain term in consideration of improvements, cause the lease to be written out, and take the land subject thereto, they cannot recover possession after the improvements have been made, but before the term has expired, though the lease was void as made by a citizen of the Cherokee Nation to one not a citizen of the Indian Territory.—POPLIN v. CLAUSEN, I. T., 38 S. W. Rep. 974.

87. LIBEL—Words Actionable per Se.—An article addressed to the proprietor of a medicine, published in a newspaper, stated that "your advertisements will not be received in the columns of the" paper, "although you offer us big money. We have repeatedly advised our readers that by the manufacture and sale of such medicines the public are swindled," etc.: Held libelous *per se*.—DR. SHOOP FAMILY MEDICINE CO. v. WERNICH, Wis., 70 N. W. Rep. 160.

88. LIFE INSURANCE — Beneficiary.—A certificate of life insurance in a mutual benefit society, by the organic law of which its beneficiaries are limited to members of the family of the insured or those dependent on him, made payable to one having no interest in the life of the insured, is void; but, if made payable to a stranger and a legal beneficiary, a party to each, the contract is not void, and the legal beneficiary is entitled to the entire fund.—BEARD v. SHARP, Ky., 38 S. W. Rep. 1057.

89. MALICIOUS PROSECUTION — Malice.—The fact that the ulterior purpose of a creditor in prosecuting the debtor for fraud was the collection of the debt does not conclusively show malice, where another reason for instituting the prosecution was a *bona fide* desire to bring the debtor to justice, and to make an example of him.—WILLIAMS v. KYES, Colo., 47 Pac. Rep. 889.

90. MASTER AND SERVANT — Assumption of Risk.—A servant, by his contract of employment, assumes the ordinary risks and dangers incident thereto.—CHICAGO, ETC., R. CO. v. SODERBURG, Neb., 70 N. W. Rep. 220.

91. MASTER AND SERVANT—Contract of Employment.—In an action for wrongful discharge, where defendant admits the contract, the burden is on him to show cause for the discharge.—MILLIGAN v. SLIGH FURNITURE CO., Mich., 70 N. W. Rep. 133.

92. MASTER AND SERVANT — Relative Duties.—One whose duty it is to ride a "trip" through the main "entry" of a coal mine, for the purpose of signaling the engineer to cut off power in case any of the cars run off the track, is not bound to look after the safety of the entry, since it is an instrumentality furnished for the doing of his work, and the furnishing of it is not a part of such work.—CORSON v. COAL HILL COAL CO., Iowa, 70 N. W. Rep. 185.

93. MECHANICS' LIENS — Complaint.—Under a statute providing that a subcontractor, in stating his demand, must state the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms of "his" contract, the subcontractor need not set out the contract between the contractor and the owner.—HARRIS v. HAREE, Colo., 47 Pac. Rep. 841.

94. MORTGAGE—Assumption of Debt by Grantee.—A covenant by a purchaser of mortgaged premises to pay the mortgage debt may be enforced by the mortgagee, whether such purchaser's immediate grantor was personally liable for the debt or not.—MARBLE SAV. BANK v. MESARVEY, Iowa, 70 N. W. Rep. 198.

95. MORTGAGES—Description — Reformation.—A mutual mistake in the description of property mortgaged is sufficient to justify the reformation of the instrument by a court of equity, not only as against the mortgagors, but also as against purchasers under them, chargeable with notice of such mistake.—CARPENTER PAPER CO. v. WILCOX, Neb., 70 N. W. Rep. 228.

96. MORTGAGES — Foreclosure—Defenses.—Where a mortgagee in an action to foreclose makes a *prima facie* case without disclosing any fraud, the mortgagor cannot set up as a defense that the mortgage was executed to defraud his creditors, of which purpose the mortgagee was aware; the contract being voidable only at the instance of the creditors.—BARWICK v. MOTES, Miss., 21 South. Rep. 238.

97. MORTGAGES—Future-acquired Property.—A manufacturing company, to raise funds with which to buy the plant and business of another company, gave a mortgage on certain described land and all buildings, machinery, and other property generally, "thereon or elsewhere erected or located, the whole constituting the plant of the said mortgagor:" Held, that the mortgage covered only the property owned by the company at the date of the mortgage.—MAXWELL v. WILMINGTON DENTAL MANUFG. CO., U. S. C. C., D. (Dela.), 77 Fed. Rep. 938.

98. MORTGAGE—Subrogation of Creditor.—The right of subrogation exists in favor of a creditor who has paid the amount of a mortgage or other incumbrance in order to protect his own subordinate lien, or when, as the holder of such subordinate lien, he has, through mistake or inadvertence, satisfied a prior lien upon the property covered thereby.—SEIEROE v. HOMAN, Neb., 70 N. W. Rep. 244.

99. MORTGAGE—Validity.—A mortgage upon real estate, other than the homestead, executed and delivered by the mortgagors, is valid between the parties and those having knowledge of its existence, although not lawfully acknowledged or witnessed.—HOLMES v. HULL, Neb., 70 N. W. Rep. 241.

100. MUNICIPAL CORPORATION — Breach of Contract by Gas Company.—A natural gas company occupying the streets of a city under a franchise must serve all

applicants for such service who comply with its reasonable rules, and make reasonable compensation; and, where the contract between the company and the consumer is but a statement of the reasonable conditions under which the company was required to perform its duty, the company's failure to perform the contract is a tort.—COY v. INDIANAPOLIS GAS CO., Ind., 46 N. E. Rep. 17.

101. MUNICIPAL CORPORATIONS — Failure to Enforce Ordinance.—A city is not liable for damages by a property owner because it failed to prevent the erection of a wooden building on an adjoining lot, in violation of an ordinance.—HARMAN v. CITY OF ST. LOUIS, Mo., 38 S. W. REP. 1102.

102. MUNICIPAL CORPORATIONS — Negligence.—In an action against a city to recover for an injury received by falling into an excavation for a cellar adjacent to a sidewalk, and projecting beyond the front of the adjoining building, there being no guard at the place, where there is uncontradicted evidence that a barrier, consisting of planks laid upon barrels, was placed on the sidewalk around the excavation after the workmen left on the day before the night of the injury, there is no evidence of negligence to authorize the submission of the question to a jury.—WELSH v. CITY OF LANSING, Mich., 70 N. W. Rep. 129.

103. MUNICIPAL CORPORATIONS—Opening Streets.—In a proceeding to condemn land for a street through a tract used for agricultural purposes, speculative damages are not to be allowed; and in determining the value of the land taken its worth at some future time is not to be considered; but the fair market value for any purpose for which it might reasonably be used in the immediate future, and if it could be platted into lots, and its present value thereby increased, such increase is a proper ground of assessment of damages. ALEXIAN BROS. v. CITY OF OSHKOSH, Wis., 70 N. W. Rep. 162.

104. MUNICIPAL CORPORATION—Power to Appoint Executive Officers.—Where the business of a city is administered through departments, the power to appoint the heads of such departments is an executive power, and under St. 1896, ch. 415, an act amending the charter of the city of Lowell, section 1 of which provides that "all executive powers which are now by law vested in the city council" shall hereafter be vested in the mayor, the power to appoint a superintendent of public buildings, which was theretofore vested in the city council, became vested in the mayor.—ATTORNEY GENERAL v. VARNUM, Mass., 46 N. E. Rep. 1.

105. MUNICIPAL CORPORATION—Regulating Speed of Street Car.—It is within the authority of a city, under its police power to regulate the use of the public streets, to enact an ordinance limiting the rate of speed at which electric trolley cars of a street railway for the carriage of passengers may be operated in such streets.—STATE v. CITY OF CAPE, N. J., 36 Atl. Rep. 679.

106. NATIONAL BANK—Contract—Authority of Cashier.—Under an allegation that the guaranty sued on was executed by the defendant bank in the name of its cashier, and that such cashier was authorized by a general usage to bind the bank to similar contracts, the plaintiff may prove any competent authority to the cashier, and is not restricted to proof of usage.—SEEBER v. COMMERCIAL NAT. BANK OF OGDEN, U. S. C. C., D. (Utah), 77 Fed. Rep. 957.

107. NEGLIGENCE—Proximate Cause.—Where a boy 12 years old voluntarily went into an excavation near a street on private property and burned his feet in a smouldering fire therein, the dangerous condition of the street, on account of steep banks at that place, if such condition existed, was not the proximate cause of the injury.—BUTZ v. CAVANAGH, Mo., 38 S. W. Rep. 1104.

108. NEGOTIABLE INSTRUMENT — Check.—An indorsement on an architect's certificate, reciting that a certain amount is due the contractor "P, H & Co., pay to the order of E" (the contractor), and signed by the owner of the building, P, H & Co., having in their hands funds of the owner to be paid out as required for the construction of the building, is a check, and not a bill of exchange.—INDUSTRIAL BANK OF CHICAGO v. BOWES, Ill., 46 N. E. Rep. 10.

109. OFFICERS—Health Officers.—The fact that the health officer of a village is a member of the board of health does not preclude such board from fixing his compensation by agreement for services performed by him in preventing the spread of small-pox; and the village may recover the amount so paid him, from the county, where such amount is reasonable.—VILLAGE OF ST. JOHNS v. BOARD OF SUP'S OF CLINTON COUNTY, Mich., 70 N. W. Rep. 131.

110. PARTITION—Ordering Sale—Decree.—A decree in partition is not void, so as to be subject to collateral attack, because ordering sale and the making of deeds by the sheriff without any provision for report of sale and confirmation by the court.—MOORE v. BLAGGE, Tex., 38 S. W. Rep. 979.

111. PARTNERSHIP—Change of Membership.—Where a partnership was formed which took the property and continued the business of an existing one, and was composed in part of the same persons who were partners in the first, but each had separate articles of partnership, and the interests of the several partners in the two were different, the second partnership was not a continuation of the first, and on a settlement of its affairs a partner cannot be credited with capital contributed to the first, in the absence of such provision in its articles, or such an agreement between its partners.—NICHOLSON v. KINSEY, Tenn., 38 S. W. Rep. 1033.

112. PRINCIPAL AND SURETY—Defenses.—As damages for breach of warranties in contract of sale constitute a counterclaim, and not a mere failure of consideration, they cannot be availed of by sureties in an action against them alone on a note given for purchase price of the article sold, without showing authority from the principal so to do.—PHOENIX IRON WORKS CO. v. RHEA, Tenn., 38 S. W. Rep. 1079.

113. PRINCIPAL AND SURETY—Discharge of Surety.—Where plaintiff recovered judgment on a claimant's bond, and allowed his judgment against the principal to become barred by limitations, the sureties on such bond are discharged.—CHOWNING v. WILLIS, Tex., 38 S. W. Rep. 1141.

114. PRINCIPAL AND SURETY—Failure of Principal to Sign.—The mere fact that a person executed a note as security for another, without any agreement that the latter's signature would be obtained, will not release the former, on failure to obtain such signature.—FASS NACHT v. EMSING GAGEN CO., Ind., 46 N. E. Rep. 45.

115. PUBLIC LANDS—Patents — Reformation.—Where one purchased from the government land previously located upon a void warrant, and his payment was received by the officers of the land department as if made in behalf of the prior entryman as a substitute for the warrant under the commissioner's circular to the registers and receivers of land offices (section 41), when in fact the payment was individual money of the purchaser, and was made solely in his own interest, and the patent subsequently issuing to the purchaser named the prior locator as patentee, equity would, as between the parties, reform the patent, by substituting the name of the purchaser for that of the prior locator.—BOYD v. MAMMOTH SPRING IMP. CO., Mo., 38 S. W. Rep. 964.

116. QUIETING TITLE—Adverse Possession.—Adverse possession need not be based on paper title.—VIER v. CITY OF DETROIT, Mich., 70 N. W. Rep. 139.

117. RAILROADS — Animals near Track.—A train need not be stopped nor its speed checked because animals are discovered near the track, unless there is a reasonable indication that they will go on the track.—YAZOO & M. V. R. CO. v. WHITTINGTON, Miss., 21 South. Rep. 249.

118. RAILROAD COMPANIES — Negligence. — Where an ordinance prohibiting the running of trains within a

city at more than six miles an hour is repealed on condition that the railroad company will maintain gates at street crossings, it is continued in force until the railroad company complies with the requirements of the substituted ordinance.—GRANEY v. ST. LOUIS, I. M. & S. RY. CO., Mo., 38 S. W. Rep. 969.

119. REMOVAL OF CAUSES—Diverse Citizenship.—The Arkansas statute requires insurance companies doing business in the State to give a bond to the State auditor, conditioned for the prompt payment of losses, and provides that, in suits to recover a loss accruing under a policy, the sureties may be made defendants, and final judgment rendered against them at the same time and in the same manner as against the company. Acts 1891, ch. 36, as amended by Acts 1893, ch. 91: Held that, in an action on such bond by a citizen of Arkansas against an insurance company of another State and a surety who is a citizen of Arkansas, the surety cannot be regarded as a merely formal party, and the action is therefore not removable to a federal court.—MUTUAL RESERVE FUND LIFE ASSN. v. FARMER, U. S. C. C. of App., Eighth Circuit, 77 Fed. Rep. 929.

120. RES JUDICATA—Dissolution of Partnership.—One D was engaged in business in different parts of the world, under various titles, and with several associates. For some time one M was in partnership with him at New York, under the name of D & Co., and at the same time D conducted business at Brussels under the name of D & Co.; the Brussels and New York concerns having dealings with each other. The partnership between D and M was dissolved, and D brought suit against M for an accounting, in which, after a long controversy, in which all matters between them, including the dealings with the Brussels house, were thoroughly investigated, a judgment was rendered against M, which was affirmed, and finally paid by him. Subsequently he filed a bill against D, as constituting the Brussels concern, seeking to reopen the account between it and the New York house: Held, that the matter was *res judicata*.—MALOY v. DUDEN, U. S. C. C., S. D. (N. Y.), 77 Fed. Rep. 935.

121. SALES—Remedying Defects.—Where a monument is sold to be set up in a cemetery, the seller could remedy any defects after delivery in the cemetery, but before it was set up.—BLACK v. HERBERT, Mich., 70 N. W. Rep. 138.

122. SALE—Warranty — Rescission.—The fact that, at the time an order for an article of a specified quality was accepted, the article had no existence, did not preclude the attaching, on delivery and acceptance, though an opportunity for inspection then existed, of a warranty as to quality, arising from the language of the contract.—EAGLE IRON WORKS v. DES MOINES SUBURBAN RY. CO., Iowa, 70 N. W. Rep. 193.

123. SCHOOLS — Contracts. — A verbal promise made by a school trustee, before his qualification, to join with the other trustees in entering into a contract with the promisee for the teaching of the school, is not enforceable.—LEWIS v. HAYDEN, Ky., 38 S. W. Rep. 1054.

124. STATUTES — Construction. — A legislative enactment will be construed to operate only prospectively, unless the intent of the legislature to the contrary is plainly expressed.—STATE v. CITY OF KEARNEY, Neb., 70 N. W. Rep. 255.

125. TAXATION — For County's Railroad Debt.—Though sufficient funds to pay off a county's railroad debt had been provided by taxation previous to a levy for a certain year, the right of complainant to maintain a bill for himself and other taxpayers to resist collection of the railroad taxes of the year is lost by delaying to file bill till the greater part of the taxes are collected.—KENNEDEY v. MONTGOMERY COUNTY, Tenn., 38 S. W. Rep. 1075.

126. TELEGRAPH COMPANIES — Negligence — Stipulations. — A stipulation of a telegraph company that it should not be liable for mistakes or delays, unless the telegram was repeated, is invalid. — WESTERN UNION TEL. CO. v. EUBANK, Ky., 38 S. W. Rep. 1068.

127. TOWN—Officers. — The employment by an incorporated town, owning waterworks, of a person as superintendent of the plant, by written contract defining his duties, and the taking of a bond for the faithful discharge of such duties, does not make the employee a town officer, as between his sureties and the town, in the absence of an ordinance or resolution creating the office of such superintendent, or specifying his duties.—TOWN OF SALEM v. MCCLINTOCK, Ind., 46 N. E. Rep. 89.

128. TRUSTS—Charitable Trusts—Cy pres.—One F conveyed a parcel of land to three persons, "trustees for the U Society," *habendum* to them "and their successors in office forever, for the sole use and benefit of the U Society, as aforesaid for a burial ground, and for no other purpose whatever." The U Society was an unincorporated association for the mutual aid of its members: Held, that the trust created by such deed, if a charitable trust in any sense, was not for a general charitable purpose which would bring it within the application of the *cy pres* doctrine, and it would end, at the latest, when the land ceased to be used as a burial ground, and the society was dissolved.—HOPKINS v. GRIMSHAW, U. S. S. C. 17 S. C., Rep. 401.

129. TRUSTS—How Created. — Where a father invests the earnings of his emancipated minor son in land, and, without the son's knowledge, has the deeds made to himself, the land is held in trust for the son. — HARLAN v. EILKE, Ky., 38 S. W. Rep. 1094.

130. USURY — Bonus Taken by Agent. — Where a husband makes a loan of his wife's money as her agent, and, besides a note made to her for the principal, with interest at the full legal rate, takes also a commission for himself, without her knowledge or consent, the loan is not usurious.—SHORT v. PULLEN, Ark., 38 S. W. Rep. 1113.

131. USURY—Set-off.—Money paid to a national bank as usurious interest on a loan of money cannot be set off in a suit brought by it, to recover the principal debt, more than two years after such payment was made. — MONTGOMERY v. ALBION NAT. BANK, Neb., 70 N. W. Rep. 289.

132. WILLS — Devisee — Capacity to Take.—The legal capacity of a corporation to take property by devise or bequest in excess of the amount prescribed by its charter cannot be taken advantage of by heirs at law or next of kin of the testator. — CONGREGATIONAL CHURCH BLDG. SOC. v. EVERETT, Md., 36 Atl. Rep. 664.

133. WILLS—Construction. — A provision that the bequest "to my said wife, A, shall not be considered as part payment of her dower interest or thirds," but that, "she shall be entitled, besides the above bequest, to all under the law in such case made and provided, as my widow," entitles A, though not testator's lawful wife, to the same interest in his lands as she would have had under the statute, had she been such.—DICKE v. WAGNER, Wis., 70 N. W. Rep. 159.

134. WILLS — Residuary Devise. — A devise of the residuary estate in trust to pay annuities, with a provision that after the death of the annuitants it should be divided among testator's grandchildren, creates a valid, active trust.—IN RE MOORHEAD'S ESTATE, Penn., 36 Atl. Rep. 647.

135. WITNESS — Privilege. — Generally, in order to bring communications made to a lawyer within the privilege accorded by the common law and declared by the statute, it must be shown that the relationship of attorney and client existed at the time the communications were made. While this rule has its exceptions, in the fact that communications properly made in negotiating for the employment of an attorney are likewise privileged, still neither the rule nor the exception, neither the letter nor the spirit of the common law or of the statute, extends the privilege to communications voluntarily made to a lawyer after he has informed the person making them that he will not and cannot accept the employment to which the communications relate.—FARLEY v. PEBBLES, Neb., 70 N. W. Rep. 231.